

J. rel. 352-3 .

~~182~~

Reeves

HISTORY
OF THE
ENGLISH LAW

VOL. II

By F. POLLOCK, Esq., Barrister-at-Law,
Lincoln's Inn, London.

HISTORY
OF THE
ENGLISH LAW.

VOL. III.

T. DAVISON, Lombard-street,
Whitefriars, London.

HISTORY

OF THE

ENGLISH LAW

VOL. III

Printed by J. B. Nichols, London.

HISTORY
OF THE
ENGLISH LAW,
FROM THE
TIME OF THE SAXONS,
TO THE END OF
THE REIGN OF PHILIP AND MARY.

BY JOHN REEVES, ESQ.
BARRISTER AT LAW.

THE THIRD EDITION.

IN FOUR VOLUMES.
VOL. III.

LONDON:

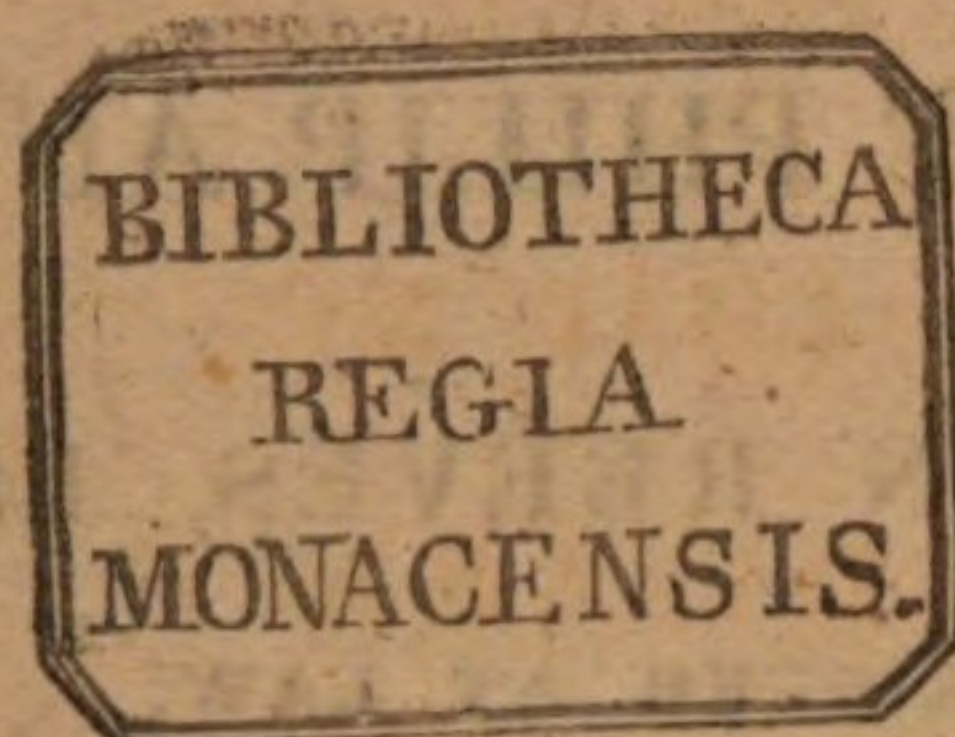
PRINTED FOR REED AND HUNTER, LAW-BOOKSELLERS,
BELL-YARD, LINCOLN'S-INN.

1814.

HISTORY

ENGLISH LAW

TITLE OF THE BOOK



THE THIRD EDITION

IN FOUR VOLUMES

VOL. III

LONDON

PRINTED FOR REED AND HURTER, LAW-BOOKSELLERS

BRILL-YARD, LINCOLN'S INN

1811

CONTENTS

OF THE

THIRD VOLUME.

CHAP. XV.

EDWARD III.

OF Descent—Limitations in Tail and Remainder—Tenant in Tail after Possibility, &c. Wills of Land—Of Warranty with Assets—Of barring Entails—Of Chattels—Of Entry congeable—Discontinuance—Remitter—Of Assises—Of Colour—De Ejectione Firmæ—Writs of Entry—Entry ad Terminum qui præteriit—Entry in le quibus—Difference of Writs in the per, per & cui, and post—Entry sur cui in vitâ—Entry ad communem Legem—Entry in consimili Casu—Writs of Formedon—Writs of Right—Other real Writs—Writ of quòd permittat. 1

CHAP. XVI.

Action of Debt—Of Detinue—Of Accompt—Of Trespass—Of Actions on the Case—Proceedings by Bill, &c.—Of Pleading—The Secta, and Law-Wager—Trial by Proofs, and other Trials—Trial per Pais—Of the Venue

CONTENTS.

—Of Process—The Crime of Treason—Homicide—
Larceny—Burglary—Appeals—Indictments—Of Pe-
nance—Trial by Battel and Jury—Sanctuary and Clergy
—Of Forfeiture—The King and Government—The
Nova Statuta—Reports—Old Tenures—Natura Brevium
—Novæ Narrationes—Miscellaneous Facts. 58

CHAP. XVII.

RICHARD II.

Copyholds—Statutes of Liveries—Of the Clergy—Here-
tics—Vicarages—Mortmain—Statutes of Labourers—
Of Pernors of Profits and Uses—Judicature of the
Counsel—Of the Parliament—Origin of the Court of
Equity in Chancery—Court of the Constable and Mar-
shal—Of the Admiral—Court of Exchequer—Statutes
of forcible Entries—Of Treasons—Scandalum Magna-
tum—Game Laws—Justices of the Peace—The King
and Government. 155

CHAP. XVIII.

HENRY IV.

Election of Members—Of the Clergy—Vicars instituted
and inducted—Statutes of Labourers—The Parliament
and Council—Attornies—Repeal of Treasons—Here-
tics—Multiplication—Pardons of Provors—Insidiatores
Viarum, &c.—Riots—Actions upon the Case—Of As-
sumpsit—The criminal Law—Peine forte et dure—The
King and Government—The Statutes—Reports. 219

CONTENTS.

CHAP. XIX.

HENRY V.

Qualification of Electors—The Clergy—The Statute of Additions—Statute of Amendments—Laws against Heretics—Forging of Deeds—Riots—Of Truce and Safe-Conduct—The King and Government. 255

CHAP. XX.

HENRY VI. EDWARD IV.

Statutes of Henry VI.—Members of Parliament—Of the Council and Chancery—Statutes of Pernors of Profits—Attaints—Writs of Proclamation—Statutes of Jeofail—Juries—Sheriffs, and Execution of Process—Attornies—Treason to burn Houses—Process in criminal Causes—Forcible Entries—Statutes of Edward IV.—The Jurisdiction of the Tourn restrained. 267

CHAP. XXI.

Tenures—Knight's Service—Escuage—Socage—Serjeanty—Homage—Fealty—Villinage—Of Copyholds—Of Rents—Estates Tail—Perpetuities declared void—Recoveries to bar Entails—Taltarum's Case—Of Dower—Tenant at Will—Estates upon Condition—Mortgages—Of Parceners—Jointenants—Tenants in Common—Attornment—Feigned Recoveries—Of Uses—Their Nature and Properties—An Executory Devise—Of Chattels—Of Contracts. 295

CONTENTS.

CHAP. XXII.

Judicature in Parliament—Origin of private Acts—The Court of Equity in Chancery—Cases determined before the Chancellor—Of Proceedings by Bill in the King's Bench—Ejectione Firmæ—Actions upon the Case—Action of Forcible Entry—Of Forger of Deeds—Damages and Costs—Of Protections—The Criminal Law—Larceny—Of Appeals—Of Provors—Of Battel—Of Clergy. 376

CHAP. XXIII.

Of Pleading—The Declaration—The Defence—Of Argumentative Pleading—A Traverse—A Negative Pregnant—Of Double Pleading—A Protestation—Departure in Pleading—Colour in Pleading—Aid Prayer—Of Garnishment—Of Interpleader—Plea of hors de son Fee—Of Nontenure—Of Jointenancy—De son Tort Demesne—Summons and Severance—Forms of Pleading—Of Demurrer—Of Jeofail and Amendment—Of Repleader. 423

HISTORY
OF THE
ENGLISH LAW.

CHAP. XV.

EDWARD III.

Of Descent—Limitations in Tail and Remainder—Tenant in Tail after Possibility, &c. Wills of Land—Of Warranty with Assets—Of barring Entails—Of Chattels—Of Entry congeable—Discontinuance—Remitter—Of Assises—Of Colour—De Ejectione Firmæ—Writs of Entry—Entry ad Terminum qui præteriit—Entry in le quibus—Difference of Writs in the per, per & cui, and post—Entry sur cui in vitâ—Entry ad communem Legem—Entry in consimili Casu—Writs of Formedon—Writs of Right—Other real Writs—Writ of quodd permittat.

THAT system of law which was discoursed upon so fully in the reign of Henry III. continued still to prevail, with such small alterations in the form and circumstances, as had been suggested by the courts, or imposed by parliament in the two intermediate reigns. Other seeming changes also had crept in, which upon examination appear nothing more than new words and terms to express old ideas. These, however, cannot be passed over in a work whose design is to throw new light upon the law,

by considering it historically; a novelty in expression being alone sufficient to obscure a subject, otherwise ever so well understood.

We shall, therefore, take a view of the changes made in the law by the determination of courts during this reign, pursuing the following order: first, of the rights of persons and of things; then of the administration of civil justice; afterwards we shall consider the alterations that took place in the nature of crimes, and the administration of criminal justice.

Notwithstanding the canonists had failed in the reign of Henry III. in their attempt to introduce their law of legitimacy (*a*), by which a child born before marriage, if marriage followed, was considered as legitimate; yet the law of England had suffered such issue to obtain a degree of right and preference before other children born out of wedlock. A child so born was called a *bastard eignè*, to distinguish it from the child born after marriage of the same mother, which was called *mulier puisnè*; *mulieratus* being the appellation applied to a legitimate son by Glanville and our other old writers (*b*). It had become the law of descent, that if a person died seised in fee, leaving issue a *bastard eignè*, and *mulier puisnè*, and the bastard entered and died seised, such regard should be paid to this undisturbed possession, sanctioned afterwards by a descent in a lawful way on his issue, that the mulier should be precluded from entering on the issue. Such was the law in the early part of this reign, and, no doubt, long before (*c*).

Many points arose upon this new piece of law, and many were settled in this king's time. It was said, that the right in the issue accrued by the dying seised of the ancestor; therefore if any thing happened that in other cases would take off the effect of a dying seised, the mulier was

(*a*) Vid. ant. vol. I. 265.

(*b*) Vid. ant. vol. I. 104.

(*c*) 21 Ed. III. 34.

not barred. Thus it was held, that should the descent happen while the mulier was within age, he should not be barred (a). Again, where the bastard entered, and continued seised for eight years, and then infeoffed another, who died seised without any interruption, it was thought that such a dying seised would not bar the mulier; but that case happened to be decided upon the nonage of the mulier (b). This privilege of the bastard only availed his issue as against the mulier and his issue, and not against a stranger; nor would it avail against the issue of the mulier, if they claimed under an intail. Thus where land was given in tail, with a remainder over in tail; and the first tenant in tail had issue a bastard and mulier, and died seised; the bastard entered, continued in possession, had issue, and died seised; the issue entered, the mulier died without issue; it was held, the second remainder-man should have a formedon, not being bound by the descent on the issue of the bastard (c).

The maxim of *possessio fratris de fædo simplici facit sororem esse hæredem* (d), or, in a more general sense, the rule of excluding the half blood, was held to as strict a construction as that about *mulier puisnè*. If a person was seised in tail, and died leaving two sons by different venters, the youngest would inherit to the eldest, *per formam doni*; being heir of the body in tail, though not in fee-simple. Thus this maxim (e) and the exclusion of the half blood was confined to estates in fee-simple wholly, and to such as were strictly in *possession*. Upon the point of possession, many doubtful cases arose. A man, having a son and daughter by one venter, and a son by another, gave his land to his eldest son in tail, and then died; so that the fee descended on the eldest son, who, being now seised in tail with a

(a) 31 Ass. 18. 22. & Bro. descent 49. (b) 36 Ass. 2. (c) 39 Ed. III. 38.

(d) Vid. ant. vol. II. 317. (e) 37 Ass. 14. 24 Ed. III. 30.

reversion in fee, died without heirs of his body; in which case it was held, the youngest son should have the land, and not the daughter (*a*). Again, land was given to a baron and feme, and the heirs of their body, remainder to the right heirs of the baron; they had issue a son, and the feme died; the baron married, and had issue another son, and died; the eldest son entered, and died seised without issue: here it was held, that the land belonged to the younger son of the half blood; for the elder, as in the former case, was only seised of the entail, and was not in possession of the reversion (*b*).

In order for this rule to take effect, the reversion should come into *actual possession*. A man seised in fee leased his land for life, and then had a son by one venter, and a daughter by another; and died, after the time at which the rent was payable, but without receiving it; then the son died before the next day of payment; so that he had only a seisin in law of the rent, and not in fact: after this the tenant for life died; and it was held, that the reversion went to the daughter, and not to the heir of the son, because the father was the person last seised; the reversion never having fallen into actual possession during the life of the elder son (*c*). Yet, on the other hand, where a guardian entered during the infancy of an elder son, and assigned dower to the widow, it was held, that the possession of the guardian was sufficient seisin of the heir, to exclude the half-blood; but the part held in dower prevented that seisin, and that the land so holden descended to the half-blood (*d*).

The interpretation of the statute *de donis*, and the whole doctrine of entails and remainders, were debated in every point of view. Limitations of a new impression were devised for the purpose of ordering property conformably with the wishes of its owners;

Limitations in
tail and re-
mainder.

(*a*) 24 Ed. III. 13. (*b*) 37 Ass. 4. (*c*) 35 Ed. III. Bro. discent 28.

(*d*) 8 Ass. 6.

and doubts were sometimes raised upon these, whether they were within the meaning of that famous act. Although no more than three species of entails are mentioned in that act, the courts had been disposed to bring almost every sort of conditional fee within the equity of it. We find in this reign the following gifts in tail and remainder: First, to a baron and feme, and the heirs that the baron shall beget on the feme. Secondly, to a man and his heirs, if he has issue of his body; and if he dies without heirs of his body, remainder over. Thirdly, to a man and his heirs, if he has any *de carne sua*; if not, the reversion to the donor. Fourthly, to a baron and feme, *et uni hæredi de corpore suo legitimè procreato, et uni hæredi ipsius hæredis*. Fifthly, to a man and his sister, and the heirs of their two bodies begotten. Sixthly, to two men, and the heirs of their two bodies begotten. Seventhly, to a man, and the heirs male of his body. We find remainders of the following kind; to a father for life, with remainder to the eldest son, and his wife in tail, remainder to the right heirs of the father; a lease for life, remainder over in fee; a gift in tail, remainder to the donor for life, remainder over in fee; and the like limitations, which may be easily imagined after these instances.

The first of the above-mentioned limitations was considered as a special tail, as well in the feme as in the baron (*a*). In the second and third entails, it was argued, that the gift was in fee-simple on the condition and terms of the tenant having heirs of his body; which event taking place, the estate descended to his right heirs: but this construction was over-ruled, and they were held to be limitations in tail (*b*). The entails to *two men*, and those to *a man and his sister*, and the heirs of their bodies, were allowed sufficient and lawful, upon this reason: that they might each re-

(*a*) 21 Ed. III. 43.

(*b*) 35 Ass. 14. 37 Ass. 15.

spectively have such *heirs* of their bodies as would satisfy the description of the entail (a). The gift to a man *and the heirs male of his body*, called upon the court to explain at large the force of the statute, as to discents in tail. The donee in that case had issue a daughter, who had issue a son, and then died; and it became a question, whether the grandson should succeed. It was argued, he should be heir in tail, because in such a gift at common law the issue would inherit in fee, on account of the word *heirs*, and the power the ancestor, after issue, had of aliening; and as the statute only restrains from alienation, when that was complied with, and the land was left to descend, it was contended that the grandson should take as before the statute, that is, in fee-simple. But it was resolved, this was a gift in tail, which did not give an inheritance so largely as a gift to a man and the heirs of his body; upon which the other side seemed to argue, that there indeed the grandson would inherit by regular discent in fee-tail *general*; but here the entail was to a *special* heir, and the grandson did not convey the discent to himself in the special manner required, as he claimed through his mother, who could not be heir under a limitation to *heirs male* (b). On another occasion, a gift to a man and his heirs male, without saying of his body, was adjudged in parliament a fee-simple.

Where land was given to a man and his wife in special tail, and either of them died without issue, the survivor

Tenant in tail
after possibility,
&c.

was by law to hold it for life, and was termed *tenant in tail after possibility of issue extinct*.

It was held, that as such tenants once had an estate of inheritance, the survivor was, though in effect only tenant for life (c), not to be impeached of waste.

(a) 17 Ed. III. 78. b.

(b) 18 Ed. III. 46. a.

(c) Old Tenures.

One of the rules which had been established respecting remainders was, that they should take effect immediately upon the failure of the preceding estate, or otherwise they should be void. Thus, where there were a brother and sister, and land was given to *A.* for life, remainder to the right heirs of the brother, and he died; after which the tenant for life died, and the sister entered; there, though the wife of the brother was afterwards delivered of a posthumous son, it was held, that the sister should retain the land; and it was said, that wheresoever a remainder or purchase vested, there it should continue; but it would be otherwise of a descent in the like case. Again, where there was a tenant for life, remainder to the right heirs of *I.* and *N.* *I.* had issue, and died; then the tenant for life died, and the heir of *I.* entered; after which *N.* died: here it was, conformably with the above case, determined, that the heir of *N.* took nothing; for he was not heir to *N.* at the time the remainder fell, for *nemo est hæres viventis*: and it was said, that where there was a tenant for life, remainder to the right heirs of *I.* the remainder was in abeyance during the life of *I.*; and if he survived the tenant for life, the remainder became void, because there was no person *in esse* to take it when it fell (*a*).

Another rule of remainders was, that they took effect at the same time when the first estate was created, and their continuance depended upon the continuance of that, all standing or falling together. Thus, where lands were given for life, with condition to perform certain duties, remainder over, with the same condition; if the heir entered on the tenant for life for breach of the condition, the remainder was likewise defeated (*b*).

Many of the remainders litigated in this reign are to be explained upon one or other of these rules. Thus, where there was tenant for life, remainder over, if the te-

(*a*) 30 Ass. 47. Bro. Doni. & Rem. 21.

(*b*) 29 Ass. 17.

nant for life died, and he in remainder agreed to the limitation, he stood in the place of the tenant for life; the particular tenant and remainder-man making but one degree in a writ of entry. If a termor or guardian leased for life, remainder over, and he in remainder agreed, he was equally a disseisor with the tenant for life; it being, in law, all one estate (*a*).

The giving an estate to a man for life, with remainder to his right heirs, was a species of limitation invented since the time of Bracton, and probably since the statute *de donis* gave an example and an authority for making strict settlements. The object of this new mode of conveyance, no doubt, was to give the heir a title by purchase, instead of one by descent, which was clogged with the heavy appendages of wardship, relief, marriage, and the like. But the courts put a construction on such gifts that wholly defeated the design of the makers. Where a gift was made to a man for life, remainder to another for life, remainder in fee to the right heirs of the first taker; it was held, that the first tenant for life might, by virtue of the limitation to his heirs, either give or forfeit the fee-simple, although it did not properly rest in him during the mesne remainder (*b*). And where an estate was given for life to a father, remainder to the first son and his wife in tail, remainder to the right heirs of the father; the father died, and then the eldest son and his wife died without issue; the lord was permitted to avow upon the younger son for the relief, as heir of his elder brother to the remainder in fee; though the younger son contended he came in as purchaser, under the words *right heirs of his father*, and that the tail and the fee could not be *simul & semel* in his elder brother (*c*).

Wills of land.

We have supposed the above settlements to have been made by some common-law conveyance in the donor's lifetime; that is, by fine, by feoffment,

(*a*) 50 Ed. III. 21.

(*b*) 24 Ed. III. 70.

(*c*) 40 Ed. III. 9.

or some other grant with livery of seisin; or such a conveyance as countervailed a feoffment, as a lease for life, or for years, with a release (*a*). These were the only methods for a voluntary transfer of freehold, by the general law of the kingdom. But there prevailed in certain places a custom, by which the inhabitants enjoyed the privilege of devising their lands by *testament*. The existence of such customs has been testified by Glanville and Bracton; but the particular influence of them, and the form of such wills, are wholly unnoticed by those writers; so that till the reign of this king there is little or nothing to be met with in any law-book upon the subject of devises of land. What hints are to be found in Bracton and Glanville relate rather to the nature of wills in general; which too, being an object of clerical judicature, were hardly thought a part of their subject (*b*). We now find many adjudged cases upon wills of lands; and some of those rules were now laid down, which governed afterwards when devises became the general law of the kingdom.

If lands were devisable, it was mostly in boroughs; and the course by which the devisee was put in possession was different. In some, it was the duty of the bailiff of the place to give him seisin; in others (and that was the most common practice) there lay a writ called *ex gravi querelâ*, which was to be executed by the officer of the town (*c*). It was held for settled law, that a husband might give land to his wife by last will (*d*), though he could not by deed; but a wife was not allowed to make a will of lands to her husband, as it would be construed to be the act of the husband, or at least to be done by his coercion; though it was allowed that she might, by the assent of her husband, devise the moiety of her husband's *goods*, and make executors, who should prove the will by the husband's assent: which

(*a*) 44 Ed. III. 3. 31 Ass. 25.

(*c*) 39 Ass. 6.

(*b*) Vid. ant. vol. I. 111. 307.

(*d*) 44 Ed. III. 33.

nearly corresponds with what was laid down for law in the times of Bracton and Glanville (*a*). If the husband, after her death, would prohibit the proving of the will, he might, and the will would be void (*b*). So stood the law, as to the wills of *femes covert*. It was not uncommon to devise land to executors to make distribution for the good of the testator's soul; in which case, should the executors refuse or neglect to do it, and take the profits to their own use, the heir might enter, and have an assise (*c*). It was held, that should one executor die, the rest might lawfully sell (*d*). There seems to have been a difference between a devise of land to executors to sell, and a devise of land to be sold by executors: in the latter case, they were considered as having no possession (*e*), but merely an authority.

There are some instances of an inclination to keep a gift of land by will within some of the strictness with which gifts by deed were construed. Where a man gave his land by will, and it was alleged that he afterwards sold it, and took it back in fee to defeat his will, it seems to have been construed as a revocation; upon the idea, we may suppose, that the fee he died seised of was considered as a new purchase since the will was made, and therefore such as could not be conveyed by an instrument made before (*f*). Again, it was held, that where land was devised without any express mention of the estate, the devisee could properly have it only for life; so that, in this respect, a devise and a livery agreed: however, it was at the same time admitted, that a devise to a man *in perpetuum*, or to a man and his assigns, would convey a fee-simple (*g*).

The courts, indeed, began to make allowances in the construction of wills, which were never indulged to deeds; and it became a rule, that the intention of the deviser was

(*a*) Vid. ant. vol. I. 307.

(*b*) Bro. Devise 34.

(*c*) 38 Ass. p. 3.

(*d*) 39 Ass. 17. 49 Ed. III. 36.

(*e*) Bro. Devise 46.

(*f*) 44 Ed.

III. 33.

(*g*) 22 Ed. III. 16.

to be sought out by all possible investigation, and observed with strictness, however untechnically it might be expressed. Thus, where a remainder was limited by will *propinquioribus hæredibus de sanguine puerorum* of the devisor, it was held, that, upon the devisor dying, leaving two sons who died without issue, and a daughter who had issue Isabel, and then died, that *Isabel* should take, and was sufficiently described by the will (*a*).

We have seen (*b*), in the last reign, that the warranty of tenant in tail, with assets in fee-simple ^{Of warranty with assets.} descending upon the issue, was held a bar to his claiming any thing under the entail. We now find the courts expressly declaring that this was admitted to be a bar, upon the equity of the statute of Gloucester, which ordained that the issue should not be barred by the act of the father to demand the seisin of the mother, unless he had value in recompence by descent from the father. But the courts were more strict in requiring a *bonâ fide* recompence to the issue of tenant in tail, than to the issue of tenant by the curtesy. For if the former had assets by descent, and aliened those assets in fee, and died; then, though himself having received assets, was barred, yet his issue, or, if he had none, his younger brother, would not be barred; every heir in tail being considered as privy to the recovery of the land in tail, unless he had had recompence by descent in fee-simple. On the other hand, if a tenant by the curtesy aliened, and value in fee-simple descended to his issue, it was a good bar, though the issue should afterwards alien the fee-simple, and die leaving issue; it being a rule, that, as the issue was once lawfully barred, the issue of that issue should have no title to demand any thing of the mother's seisin (*c*). As warranty implied that it was accompanied by a recompence, the law took care that such recompence should really continue; and such great force was allowed to a warranty so

(*a*) 30 Ass. 47.(*b*) Vid. ant. vol. II. 323.(*c*) O. N. B. 145. b. 144. a.

circumstanced, that it was held sufficient not only to bar the issue, but the reversion, even if in the king (*a*). But assets without a warranty were of no more effect than a warranty without assets (*b*).

When assets were considered so necessary a requisite to give effect to the warranty of the person aliening an estate in prejudice of his issue, it was merely in compliance with the rule which had been adopted from the statute of Gloucester; the warranty being of itself sufficient, at common law, to bar the issue from making any claim against it (*c*): and the statute *de donis*, which had forbid the alienation of the tenant, had not taken away the force of his warranty.

Of barring entails.

And so it was held in another instance of warranty; for if the uncle, or other ancestor, or cousin *collateral*, who was not privy to the entail, aliened with warranty, or made a release with warranty, and died without heirs of his body, so that the *next issue in tail* was become his right heir, such issue would be barred by his ancestor's deed with warranty (*d*). As for instance, where there was a tenant in tail, the remainder to *E.* in tail, the remainder to *C.* in tail, and the first tenant in tail died without issue; *E.* in the first remainder made a feoffment with warranty, and had issue, and died, and then the issue died without issue; so that *C.* in the second remainder became heir to *E.*; here, though the issue of *E.* would not be barred, because there were no assets by descent, yet *C.* was held to be barred by the warranty (*e*). The same if an uncle of tenant in tail released with warranty to an alienee of the tenant, this would bar the issue from claiming, though the uncle never had possession or right in the land.

Thus an estate tail might be barred by the warranty of an ancestor under whom the estate *was* claimed, if accompanied with assets; and by the warranty of an ancestor

(*a*) 46 Ed. III. 28. 45 Ass. 6. (*b*) 38 Ed. III. 23. (*c*) Vid. ant. vol. I. 447. (*d*) O. N. B. 143. b. 144. (*e*) Bro. Garr. 8.

under whom the estate was *not* claimed, without any assets; which first warranty has since been called *lineal*, and the latter *collateral*, because collateral to the title by which the estate was claimed. These were treated as bars to which an estate tail was subject in its very creation, and which were unaffected by the prohibition of the statute *de donis*. When all this efficacy was attributed to a warranty, it was convenient that it should not be misapplied so as to protect wrong-doers, and to defeat the injured from pursuing their rights. If therefore a guardian or tenant at will aliened the land of the heir, or of the lessor, with warranty, as this conveyance amounted to a disseisin, the warranty was void as against the heir or lessor (*a*). This was afterwards called *warranty commencing by disseisin*.

The alienation of tenant in tail being somewhat opened by the above means, and the remaining restraint being perhaps still more felt than ever, application was made to parliament more than once during this reign, for the assistance of a statute to adjust the difficulties complained of. In the 17th year of the king, the commons petitioned, that the statute of Westminster might be declared, as to the cases in which the issue in tail might lawfully alien (*b*); but this was refused, and the petitioners were referred to the law as it then stood. In the 50th year, there is a petition of the commons upon the subject of collateral warranty; which, however, makes no mention of its effect on an estate tail, but merely notices the common case of a warranty, as it regarded estates in fee simple. The petition states the law long to have been, *and with good sense and reason*, that where any one was disseised of his freehold, and a collateral ancestor of the disseisee released to the disseisor, then being in possession, with a clause of warranty; that the disseisee, should the warranty descend on him, would be for ever barred of his right. But, continues the petition,

(*a*) 43 Ed. III. 7.

(*b*) Rot. Parl. 17 Ed. III. 47.

in many other cases *not here named*, the warranty of a collateral ancestor is considered as a bar, though nothing descend from the ancestor; which is a great damage and disherison of many. It was therefore prayed, that no such warranty thenceforward to be made should be a bar in any action, unless tenements to the value had descended on the demandant from such ancestor, according as it had been ordained by the statute of Gloucester (a). But this application not succeeding, collateral warranty continued as effectual as before.

The idea of an *excambium*, or, as it was now more usually termed, a recompence in value to the issue, was the prevailing principle by which entails were governed and modified. In the 46th of this king, where a man had given land and rents in tail, with permission that the donee might alien for the benefit of the issue, it was said in support of it, that the donor might as well give an estate tail under conditions, as make a simple gift in tail (b). An alienation after a gift circumstanced like this, so far from a violation of the statute, seemed to be in the very spirit of it; for the will of the giver expressed in the deed of gift, would, by such alienation, be strictly adhered to. In the following case, where the alienation had no authority but the tenant's own act, and the reasons he could give in justification of it, the decision depended wholly on the efficacy then attributed to a recompence, or, at least, an apparent benefit and advantage to the issue. This is the case of *Octavian Lombard*. A younger brother, in the absence of the elder abroad, entered on the lands entailed, enjoyed them for some years, and then died seised, leaving issue; at some distance of time the elder brother returned, and, raising a question about his title, he and the tenant in possession came to a compromise; the elder brother re-

(a) Rot. Parl. 50 Ed. III. 77. Note, this is No. 68 in Cotton.

(b) 46 Ed. III. 4. b.

leased his title, in consideration of which the issue of the younger granted him a rent out of the land, with a power of distress. It was held, that this rent-charge should be levied against the issue, notwithstanding the entail, and should continue, into whatever hands the land should come (a). Thus was the quieting of the title considered as a sufficient consideration and value to the issue for the defalcation they suffered by the rent-charge; though it was plainly a breach of the donor's will, at least of the interpretation which had been put on that part of the statute which forbids alienation.

These were the observations that occurred concerning the novelties that had lately been introduced into the doctrines of real property. The learning of real property fills the reports of this reign, and leaves very little space for information respecting chattels and personalty. It may be sufficient, from that little, just to remark, that *chattels* were now divided into *real* and *personal*. Thus a term for years was called a chattel real; other moveables were called chattels personal (b). Certain limited interests in real property, besides terms for years, were called chattels, as the next avoidance of a living. A security by statute merchant belonging to a woman, as it went to the husband, if she married, was therefore said to be only a chattel (c).

So much has been said in the former chapter on the jurisdiction of courts, that nothing need be added; passing over them, therefore, we shall proceed to speak of such actions as were now in use, beginning with assises and real actions.

Before any thing is said of the alterations which the assise and other actions had undergone, it will be proper to premise some observations upon those ousters of freehold

(a) 44 Ed. III. 21. b. (b) Old Tenures. (c) 39 Ed. III. 37. 37 Ass. 11.

that were the ground of such remedies. The old law by which assises and writs of entry were governed, was founded on principles that naturally and necessarily lead to the conclusions that began now to be founded thereon, and which had grown to considerable magnitude as well as curiosity in this reign.

If a man was deprived of his freehold in a way that was termed a *disseisin*, we have seen that he might make an *entry* thereon; and if that failed of recovering the possession, or he chose rather to resort to legal remedies, he might have an assise of novel disseisin (a). This *entry* was *congeable*, as they now called it, during the life of the disseisee, unless the land descended from the disseisor to his heir, and then the *descent* was said to *toll the entry*, and the disseisee was driven to a writ of entry. This right of entry might be kept alive by an entry within a year and a day before the death of the disseisor; or, if the disseisee was prevented by danger or menace from actual entry, by a *claim*; and in such case he might have his assise even against the heir, notwithstanding the descent.

Another way in which a man might be deprived of his freehold was, by what was called a *discontinuance*. In such case, the party injured could not by law make an entry, and of course could not have a remedy by assise; but he was obliged to resort to his writ of entry. Thus, in order to decide whether an assise or a writ of entry was the proper remedy, it was often necessary to discuss some or all of these questions; whether the *entry* was *congeable*; whether it was *tollled by descent*; whether it had been kept on foot by *claim*, or, as it was in after-times called, *continual claim*; or whether it was not such an ouster as amounted to a *discontinuance*. All these composed, as it were, new titles in the law, though deducible from principles before

(a) Vid. ant. vol. I. 322. 324.

laid down in the time of Bracton (*a*). As these points now entered more or less into most questions that arose upon the doctrine of estates, it will be necessary to consider them somewhat particularly. After some few observations upon a *disseisin*, which is the foundation of the rest, we shall go on to treat of these articles more minutely.

The very large sense in which the term *disseisin* was understood in the time of Bracton, might preclude the necessity of saying much to shew the great extent in which it was now received: the decisions of this reign seemed to be only confirmations or explanations of that author's doctrine; but as such they are worthy of notice.

It appears from Bracton, that any incroachment upon, or disturbance to, the free use of a man's freehold was a *disseisin* (*b*). In the same spirit of the old law it was now held and decided, that to dig in a man's ground, to fish in his water, to cut a tree (*c*), to inclose so as to prevent a man enjoying his common (*d*), a rescous, or even replevin, or inclosure to prevent a distress for rent *service*; and a detainer, rescous, replevin, and inclosure, accompanied with a denial of a *rent-charge*, or a menace to prevent making a distress in either case, were all *disseisins* of the freehold (*e*). A command not to enter was held a *disseisin* of the lawful owner (*f*). Again, conformably with the same cases stated by Bracton (*g*), it was held, that if a termor for years made a lease for life, he and his lessee were *disseisors*; a guardian making a feoffment in fee, or devising, was a *disseisor*; and the feoffee was now held to be equally a *disseisor* (*h*). Since Bracton's time the limitation of remainders had become more common; and it was now held, that where a guardian leased for life, the remainder in

(*a*) Vid. ant. vol. I. 323. 339. (*b*) Vid. ant. vol. I. 321. (*c*) 11 Ass. 25.
 (*d*) 8 Ass. 18. (*e*) 21 Ed. III. 34. 49 Ass. 5. 3 Ass. 8. (*f*) 26 Ass. 17.
 (*g*) Vid. ant. vol. I. 321. (*h*) 50 Ed. III. 22.

tail, the remainder-man was equally a disseisor with the guardian: the same where a tenant for years aliened in tail, with a remainder over. If the tenant in tail died without issue, and the remainder-man entered, he was a disseisor (*a*). In short, wherever a man was seised wrongfully (if the entry was not tolled), he was a disseisor; as for instance, dower was assigned to a woman, with all the usual forms of law; but it turning out that she was not really married, she was therefore considered as a disseisor (*b*). If an attorney made livery of seisin not exactly in the way in which he was authorized by his warrant, it was a disseisin to the feoffor; even where the warrant was to give a simple livery, and he made it upon condition (*c*). Entry under a void grant was held a disseisin (*d*). A devisee entering under a devise of an infant's land made by a guardian, was considered as a disseisor (*e*). All commanders and counsellors, and those who agreed afterwards to a disseisin, were disseisors (*f*). Such of these cases as were not deemed disseisins at common law, were warranted by the principles delivered in Bracton, or at least by the statute made since his time, for extending the writ of assise (*g*).

When a man was disseised of his freehold, it was a provision of our law, that he might repossess himself of it by an actual entry thereon; by doing which, he again became in legal seisin, and the continuance of the wrongdoer amounted to a disseisin, for which an assise would lie. This entry was sufficiently performed by putting the foot upon the land (*h*). The time of making this entry, and of pursuing it with force so as to regain the possession, was limited, in the time of Bracton, to the space of a few days; unless the party was then out of the way upon a journey,

(*a*) 50 Ed. III. 22. Bro. Diss. 85. (*b*) 21 Ed. III. 45. (*c*) 12 Ass. 24.
 (*d*) 24 Ed. III. 32. (*e*) 28 Ass. 11. (*f*) 27 Ass. 31. 37 Ass. 8. Bro. Diss. 104.
 (*g*) Westm. 2. ch. 25. Vid. ant. vol. II. 204. (*h*) 22 Ed. III. 15.

or the like: but all through this reign, it seems to have been a rule, that an entry should not be made on a person who was in by title, unless in very special cases; and where the tenant was party to the fact, it seems to have been limited to a seisin for a year and a day (*a*). However, after such entry, the right of bringing the assise still continued during the life of the person making the entry, which right is sometimes meant when the right of entry is spoken of.

The following were cases where such a right of entry <sup>Of entry con-
geable.</sup> was permitted: If a tenant for life in-
feoffed the first remainder-man, who died without issue, then the second remainder-man might enter (*b*). If a tenant for life, or tenant after possibility of issue extinct aliened, the person in reversion might enter (*c*). If a tenant for life aliened in fee, and the remainder-man in tail died without entering, the next remainder-man in fee might enter (*d*). This right of entry would be taken away, if the land in question passed by descent to the present possessor, the law in favour of descent allowing a presumptive title to him, which was not to be defeated by an entry; but if the person who had the right of entry was an infant, he would not be foreclosed of his right of entry: the same, if he was in prison, or under any of those disabilities which the law in many cases allowed as a sufficient excuse for neglect in pursuing legal remedies. Such claim so established the right of entry, as to convey it to the heir.

Every advantage which a man secured to himself by entry might be acquired by *claim*, if he was deterred from making his entry by a fear of death, or of maiming: a claim made under such circumstances would give the same

(*a*) Bro. Ent. Cong. 85.

(*b*) 41 Ed. III. 21.

(*c*) 45 Ed. III. 21. 25;

(*d*) 43 Ass. 45,

seisin as an actual entry (*a*). In the 38th year of this king, an assise was maintained by a person who had right by discent, at the death of the person last seised; it appeared that his ancestor was residing in the town where the land was, and by parol claimed the tenements among his neighbours, but durst not approach the land for fear of death, or some bodily hurt (*b*): many cases of the same kind appear in this reign. The case just mentioned was adjudged to have the effect of continuing to the heir the right to bring an assise, instead of being driven to his writ of entry; so that this new idea of perpetuating a right of entry by claim had altered the law in this point since Bracton's time; for then the assise could not be prosecuted by the heir of the disseisee, unless it had been actually commenced by the disseisee, and he had gone so far as a view, or the swearing of the jurors (*c*); but he was driven to a writ of entry. A *claim* would likewise prevent the consequence of a discent from the disseisor to his heir; for it was decided, where there had been a claim, and debate raised against the seisin of the person in possession, and he died, and then the disseisee died, and the heir of the disseisee entered on the heir of the disseisor, the entry was congeable, and the assise was the proper remedy (*d*). This, like the former, was an alteration of the law since the time of Henry III.

Discontinu-
ance.

A discontinuance was a disseisin, and something more: it was where a person aliened lands, to which another had a right, but was prevented by such alienation from making an entry; and so was driven to some of those writs of entry that have been so often mentioned. Thus where an abbot aliened the lands belonging to his abbey, and died, his successor could not enter, though he had a right, but was obliged to bring his writ of entry *sine assensu capituli*. Again, where a man aliened lands

(*a*) 49 Ed. III. 34.

(*b*) 38 Ass. 23.

(*c*) Vid. ant. vol. I. 339.

(*d*) 25 Ass. 12.

which he had *jure uxoris*, and died, the wife could not enter, but must bring her writ of entry *cui in vitâ*. So if tenant in tail infeoffed another, and died leaving issue, the issue could not enter, but must bring a *formedon*. All these were now called *discontinuances*. Though this efficacy was allowed to a feoffment when made by a tenant in tail, on account of his being in possession, and the force attributed by the law to a livery of seisin, which carried a fee simple; yet a release of a tenant in tail in possession was held not to be a discontinuance, unless accompanied with a warranty (a); and a grant of a reversion even with a warranty was adjudged to be no discontinuance (b).

We cannot dismiss the subject of disseisin and discontinuance, without saying something upon Remitter. another head of law, which was a very frequent consequence of the two former. This is a *remitter*; the meaning of which was this, that where a man was in possession of land by an elder and a latter title, the law construed him to be in possession under the first, and not under the last; so that he was said to be *remitted* to his first estate, or, as it was sometimes expressed, *en son primer estate, en son meliour droit, en son melior estate*, and the like (c). This construction of law was with a design of maintaining the original settlement of estates, whenever broke in upon by the present possessor; and as this was mostly attempted by tenants in tail, the law of remitter seemed to operate in aid and in the spirit of the statute *de donis*. Thus, where baron and feme tenants in tail had issue a son, and discontinued their estate by fine, and took back an estate to themselves and the heirs of the body of the baron *only*, they were adjudged to be remitted to their former estate (d). Again, where tenant in tail made a feoffment, and died, and the feoffee infeoffed the issue within age, it was held a remitter to the elder estate (e). Where

(a) 24 Ass. 28.

(b) 36 Ass. 8.

(c) Ed. III. passim.

(d) 44 Ed. III. 26.

(e) 40 Ed. III. 43.

there were remainders over, a remitter of the first taker was a remitter of all the following remainders, so as to take the estate out of those on whom it had been entailed by the new settlement (*a*). If a disseisor infeoffed the disseisee and two others, the whole accrued to the disseisee only, and that by remitter (*b*).

Thus have we given a sketch of these new terms, though not wholly new doctrines, of *congeable entry*, *discent that tolls entry*, *discontinuance*, and *remitter*; all which were intimately connected with and dependent upon each other, and were afterwards worked up into a very complicated system of learning; there being, perhaps, no question in any branch of artificial knowledge more problematical than such as arose upon entries, and upon discontinuances of estates.

Of assises. Having considered the nature of disseisin, and the circumstances attending it, we come to treat of the assise of novel disseisin. Whatever difference there may appear between this proceeding in the present reign, and in the time of Henry III. when so much was said upon it, it is more in *terms* than in reality; the substance and form being nearly the same as they were originally. The most striking difference seems to be in the silence about *turning assises into juries* (*c*); a piece of practice that was so much discussed in the early ages of this proceeding. But as this distinction was occasioned by the penalty of attaint, to which recognitors of assise were subject, but not jurors, it no longer was necessary to keep up this distinction, since the legislature had granted attainments against jurors in all pleas of land. Though we hear, therefore, no more of the modification thereby expressed, the thing was practised as often as the assise was put to inquire of any matter besides the mere seisin and disseisin.

(*a*) 41 Ed. III. 17.

(*b*) 29 Ass. 26.

(*c*) Vid. ant. vol. I. 336.

An assise, in the present language of the law, was considered as capable of being taken four ways; that is, first, in point of assise; secondly, out of the point of assise; thirdly, for damages; fourthly, at large. An assise *taken in the point of assise* was, when the recognitors tried the general issue, *nul tort, nul disseisin*. An assise *out of the point of assise* was, where the tenant pleaded some special matter in bar, shewing why the assise should not be taken; as a release, or some foreign fact to be tried in another county. An assise *taken for damages* was, when such special matter was found against the tenant, or he confessed the ouster, and the assise was charged to inquire only of the damages. An assise *taken at large* was, when, notwithstanding some deed or special matter pleaded, the title and all the circumstances were sent to be tried by the recognitors; all which seems very reconcileable with the account of taking assises given by Bracton (a).

The taking an assise *at large* was considered as the most liberal mode of doing justice between the parties; it was breaking through the plea which was designed to stop the assise being taken, and it was throwing the merits of the question, whether it depended upon a fact or a title, fairly before the recognitors. Whenever either the plaintiff or tenant were infants, and a deed or a fine, or any other matter was pleaded in bar that in a common case would have stopped the assise passing, it was the practice for the judge to direct the assise to be taken at large (b). Instances of this are numerous all through the book of assises. An assise would be taken at large upon a defect in the pleadings; for as the direct point in this proceeding ought to go to the assise, if what was pleaded in order to prevent the assise, by throwing the question upon another fact, failed in so doing, the result was, that the assise should pass. Thus, it was laid down as a rule, that where a bar was pleaded, and the

(a) Vid. ant. vol. I. 334, &c. (b) 8 Ass. 28. 10 Ass. 1. 28 Ass. 6. 11 Ass. 6.

plaintiff in reply made out his own title without traversing the bar, and the tenant omitted to rejoin to the title, the assise should not be taken upon the title, but *at large*; and if the assise found the plaintiff seised by any other title than that he had stated, he would recover. Again, where a tenant pleaded a release, and the plaintiff in his reply made title since the release, without traversing the bar, there the assise was taken at large; namely, upon the seisin and disseisin, under any title whatsoever (*a*). It seems from these instances, that the taking an assise at large, was the same as taking it in the very point of assise; only the latter was upon a plea of the general issue, the former upon a defect in the pleading to issue after a bar. Another instance in which an assise would be taken at large was, where, after pleading in bar, the tenant made default (*b*).

The grand object of the tenant in an assise being delay, his business was to plead such matter in bar, as would prevent the assise from being taken. To effect this, he was often under a necessity of suggesting some pretended title, which, being unfit for the judgment of the *lay gents*, must be determined upon by the court; and however it might turn out in the event, if it deferred the assise, it had answered the purpose for which alone it was designed. One way of effecting this was, by admitting in the plaintiff some *Of colour.* *colour* of a title, but such a one as could not be supported against the real one that resided in the tenant; and then praying the judgment of the court, if the assise ought to inquire of a disseisin, where no disseisin could possibly be committed by the tenant who had the better title. This was said to be *giving colour* to the plaintiff. This sort of pleading will be better explained by an instance. A case happened where a prioress had granted a lease to a man and his wife for years; the wife died, and the husband married again, when the prioress entered, with consent of the hus-

(*a*) 28 Ass. 17.(*b*) 22 Ed. III. 4.

band, and gave livery of seisin to him and his wife for their two lives: then the husband died, and the prioress entered; upon which an assise was brought by the woman. The prioress, in order to prevent the assise being taken, pleaded in bar the above matter, only stating, instead of the livery of seisin to the husband and wife for their lives, that they came to her and prayed her to enlarge their estate; upon which she granted them a *confirmation* for their two lives; and upon the death of the husband she ousted the wife, as she by law might. It was argued upon this, that the plea was no bar, because it *admitted* no *colour* of title in the plaintiff, but a mere confirmation, at a time when the plaintiff had no estate upon which it could enure: besides which, she was a feme covert at the time, and so upon the whole the confirmation was utterly void. It was therefore, they said, only a plea to the assise, and they prayed the assise might be taken; meaning, that it contained no matter of law, but was a mere denial of the disseisin. But it was answered, that this was a *colour* in the plaintiff; for it had been adjudged a good bar to say, that a woman entered after the death of her husband, and claimed dower: for though it was necessary that dower should be formally assigned, yet as she had *colour* to claim it, it was reckoned a good bar. It was for the like reason so adjudged in the present case, and the plaintiff was put to reply, and then he stated the truth of the case as above related (a).

The point to be considered in these pleas was, whether they were a good bar; that is, whether they contained such matter as should not be trusted to the determination of unlettered jurors. Too scrupulous an attention to men's rights, and a jealousy of the interference of juries in matters of law, induced the courts to entertain all such pleas as upon the face of them purported to be pregnant with good matter in law; the truth of such suggestion remaining to be sifted by the replies and rejoinders that were to follow.

(a) 40 Ed. III. 23, 24.

The action of trespass, which in many other respects bore an affinity with, and of late had become in many cases a substitute for, the assise, did in this particular also resemble it; and *colourable pleading* was as common and as expedient in trespass as in assise. The following is a case in trespass, where this sort of pleading was resorted to. In trespass for taking and carrying away the plaintiff's corn, the defendant pleaded, that he let the land where the trespass was supposed to be committed, to one *John* for life; which *John* died, and the defendant entered; after which came the plaintiff and sowed the ground, and then the defendant cut the corn; he therefore prayed the judgment of the court, if he ought to answer for this as a trespassor. It was contended by the other side, that this amounted to saying, that he did not carry away the plaintiff's corn, and it was accordingly offered to join issue thereon: but the defendant's counsel said, they had *admitted* (that is, given colour) that the plaintiff sowed in the defendant's land, and that the defendant cut it, as he well might, and that if the plaintiff pleased, he might have had an assise. The plaintiff's counsel, maintaining the first objection, said, if it was not growing on our land, then it was not our corn, and therefore it amounted only to a denial of carrying away the plaintiff's corn. But one of the justices said, that it was a good plea in bar to say, that it was the defendant's freehold, without more; and he has said more, namely, that the plaintiff sowed the land; therefore, if he has any special matter, it would be more reasonable to shew it in a reply, than to send it upon the general issue to the *lay gents*, who have no knowledge of law; so that the plaintiff was obliged to reply (a). These are some examples of pleading with *colour*, which began now to be practised, but was not yet so thoroughly explained upon principle as in after-times, when it was wrought into a very curious piece of learning.

(a) 38 Ed. III. 26.

Assises were to be taken in the county where the land lay, as ordained by *Magna Charta* (a). If at the assises a foreign matter was pleaded, triable in another county, the way was to remove or adjourn the assise into the common pleas; from thence a *venire* was issued into the proper county; and then a *nisi prius*; upon the return of which, with the issue tried, if it was found for the plaintiff, it would perhaps be remanded into the first county, for the assise to find the damages, and for judgment to be there given. If there was nothing in the case but the foreign matter, then it was usual for the justices of the common pleas to give final judgment. It was not uncommon, after the plea in bar was tried, whether in the proper or in a foreign county, for the assise to be put to enquire of the circumstances. If the lands lay in Middlesex, then, as there were no justices of assise in that county, the assise might be brought in the king's bench. Together with the writ of assise, it was usual for the plaintiff to sue out a *patent* of assise; this being necessary to entitle him to have a trial before the justices of assise; and if he had it not, the tenant might have judgment (b).

Next to the assise of freehold, those of common of pasture and of nuisance present themselves; but neither of them seem to differ from those in the time of Bracton. The assise of nuisance, if brought in the county, was called *de parvo nocumento*. The proper objects of such viscontial writs were expressed in two quaint Latin verses (c).

The doctrines of nuisance and disseisin stood now in the same relation to each other, and were governed by the same principle, as in Bracton's time (d), and the distinction, by which the injured person was to be governed in resorting to one or the other, was still the same; only the con-

(a) Vid. ant. vol. I. 245.

(b) 29 Ass. 21.

(c) *Fab* *rica* *ca* *gultum* *ges* *es*
fur *porta, domus, vir* *gur* *mol* *murus, ovile,*
Et pons, tradantur hæc vicecomitibus.

(d) Vid. ant. vol. I. 345.

clusion from that distinction was now different; for instead of having his choice of the two, he was *confined* by the nature of his case to one only. It was laid down, that where a person turned a course of water, so that his neighbour's mill could not work, an assise of disseisin would lie, if the turning of the water and the mill were in the same vill; but if in different vills, then the remedy must be, an assise of nuisance in the vill where the *turning* happened (*a*). If the place where the nuisance was raised, appeared upon evidence to be the freehold of the plaintiff, he would be nonsuited, as having chosen a wrong remedy; this being a case where he should have had an assise of disseisin, or writ of trespass (*b*). The judgment in assise of nuisance was to compel the party to remove it.

We find in this reign a more particular mention of the *assise of fresh force*; a writ which has been glanced at in the reign of Edward I (*c*). This lay where a man was disseised of tenements *devisable*, as they were by custom in the city of London, and in some other boroughs and towns. The disseisee was to lodge his plaint in the court of the franchise; when, upon shewing he was disseised, twelve men were appointed to try it, as in an assise of novel disseisin. This was called *fresh force*, because the entry of the plaint and the recovery thereon were to be within sixty days, or the plaintiff would be barred of this remedy, and driven to an assise at common law. To quicken the execution of a judgment herein, the plaintiff might have a writ out of chancery to the bailiffs of the franchise (*d*).

The writ of *quare ejecit infra terminum* was (*e*) now always followed by the process of summons, attachment, and distress; and an outlawry might be had thereon; the real process used in Bracton's time being now obsolete; and of course, instead of *Præcipe*, it now always began with *Si te fecerit securum, &c.* But a writ of trespass had lately

(*a*) 9 Ass. 19.

(*b*) 32 Ass. 2.

(*c*) Vid. ant. vol. II. 152.

(*d*) O. N. B. 96.

(*e*) Vid. ant. vol. I. 342.

been contrived for redress of termors who had been ejected from their term: this was called *De ejectione firmæ*. The words of this writ were: *Si A. te firmæ fecerit securum, &c. ostensurus quare vi et armis in manerium de I. quod C. præfato A. dimisit ad terminum decem annorum, qui nondum præteriit, intravit, et bona et catalla ejusdem A. ad valentiam, &c. in eodem manerio inventa cepit et asportavit, et ipsum A. a firmâ suâ prædictâ ejecit, et alia enormia ei intulit, ad grave damnum ipsius A. et contra pacem nostram, &c.* (a) This was a common writ of trespass for entering land, and taking away goods, with the addition of certain words adopted from the *quare ejecit infra terminum*, namely, *quod dimisit ad terminum decem annorum, qui nondum præteriit, &c. de firmâ ejecit, &c.* and the appellation of *ejectione firmæ* might be copied from the *ejectione custodia*, which was likewise a writ of trespass. This action lay not only against strangers, but against the lessor, notwithstanding the old argument, that a man could not enter *vi et armis* into his own freehold (b); the possession of a termor for years being now considered as equally sacred with the seisin of a freeholder, and to be protected even against the freeholder himself. This writ went only for damages, the term being to be recovered in the old writ of *quare ejecit infra terminum*, or the still older of covenant (c).

Little need be said of the writ of *mortauncestor*. This remedy was less recurred to than in the time of Bracton, it being in many cases supplied by the *formedon in dis-cendre*, and several writs of entry. The same may be said of writs of *cosinage*, of *ael & besael*; which, being of similar import with the *mortauncestor*, followed its fate in the revolution of legal remedies.

Next to the assise of novel disseisin, the most common remedy in ousters of freehold was the

Writs of entry.

(a) O. N. B. 122.

(b) 44 Ed. III. 22.

(c) Vid. ant. vol. I. 341.

writ of entry. Writs of entry were various even in the time of Bracton (a); but, still being of a special form, and confined to certain circumstances of freehold and estate, it had been found necessary in the reign of Henry III. (b) and again in that of Edward I. (c) to accommodate these writs to new cases of injury to freeholds. Owing to these parliamentary enlargements, writs of entry had become very numerous and common. To bring into one point what has already been said in different parts of the foregoing History, and give the reader a just idea of the variety and comprehensiveness of *real* remedies, it may be proper to recapitulate shortly these writs, with some cursory observations upon them, as they now stood.

The writ of entry which first presents itself, and which from its simplicity deserves our consideration first, is that *ad terminum qui præteriit*. The form of the writ was, *Præcipe A. quòd justè, &c. reddat B. unum messuagium, &c. quod eidem A. dimisit ad terminum qui præteriit, ut dicitur. Et nisi, &c. et prædictus B. fecerit te securum, &c. tunc summone, &c.* corresponding precisely with the form in the time of Bracton (d). This was the remedy resorted to by a lessor, where lands or tenements were let for a term of years, and the tenant held over his term. Instead of bringing this writ, the lessor might enter, and, if he was ousted, he might have an assise of novel disseisin. This writ of entry lay also where there was a lease for the life of another, and the lessee held over; or if the tenant for life aliened and died. If the land was recovered against the tenant for life, and he died, the reversioner might have this writ in the *post* (e); for this, like all other writs of entry, might be had in the *per*, *per et cui*, and *post*. But if the reversion was granted over, and the tenant for term of life aliened and died, the grantee of the reversion,

(a) Vid. ant. vol. I. 393, &c. (b) Vid. ant. vol. II. 72. (c) Vid. ant. vol. II. 190, &c. (d) Vid. ant. vol. I. 388. (e) Vid. ant. vol. I. 389. 397.

being a stranger, could not have this writ, which lay only for the lessor, or his heir. For a similar reason, it did not lie for the reversioner after the death of a tenant in dower, or by the courtesy, who took an estate by the common law, and not by lease. It appears by stat. West. 2. c. 25. (a) that if a tenant for years or a guardian in chivalry aliened in fee, the lessor or infant might have an assise of novel disseisin, and the feoffor and feoffee should both be named disseisors: the assise might be brought during the life of any of them, but if they were all dead, recourse must be had to a writ of entry.

If this or any other writ of entry was in the *post*, the following clause, which subsisted even in Bracton's time (b), was always inserted, *et unde quæritur quòd prædictus A. ei deforceat, &c.* but never in those in the *per*, and *per et cui*. Again, wherever a person demanded of the possession of an ancestor, it should always be by title, as *quod clamat esse jus et hæreditatem suam, &c.*; but when he went upon his own possession, he was never to make title. There was an exception to this, where a woman demanded her inheritance or *maritagium*, that had been aliened by her husband, or her dower aliened by another husband; for in such cases, in a *cui in vitâ* to recover, she was to make title in the above manner (c).

We have seen that in Bracton's time, where a gift was alleged to be made by a person *non compos mentis*, an inquisition used to be made, whether the donor was of sane mind (d). But now there was a remedy, by a writ of entry *dum non fuit compos mentis*; which was in this form: *Præcipe A. quòd justè et sine dilatione reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quod idem A. non habet ingressum nisi per C. patrem prædicti B. cujus hæres ipse est, qui illud ei dimisit dum non*

(a) Vid. ant. vol. II. 204, 205.

(b) Vid. ant. vol. I. 399.

(c) O. N. B. 123. b.

(d) Vid. ant. vol. I. 292.

fuit compos mentis, ut dicit, &c. This writ lay for the heir of the person who was *non compos mentis*, and who was dead; and the general opinion was, that it would not lay for the person himself who had made the alienation; because no one was to be received to disable, or *stultify* himself, as it was afterwards expressed: however, it was laid down in the register of writs, that he might maintain this writ, and in such case the heir would be received.

Another writ to recover land that had been conveyed by a person disabled in law to make a gift, was the writ of entry *dum fuit infra ætatem*. This writ originated since the time of Bracton, and was in this form: *Præcipe A. quòd justè, &c. B. qui plenæ ætatis est, ut dicit, duas acras terræ, &c. quas idem B. ei dimisit, dum fuit infra ætatem, ut dicit, &c.* Where an infant aliened land that had descended to him during his infancy; or that he had purchased to himself for life, or in fee; he might, when of full age, have recovery thereof by this writ. But if an infant leased his land for a term of years, and afterwards made a confirmation, or release, before he came of age, he could not when of age have this writ, because this was no alienation; for an infant could not make a *demise* of the freehold, till livery of the land was made to him: but, in such case, he might have an assise of novel disseisin.

If an infant aliened in fee, and died leaving issue; his issue, when of age, might have this writ for the lands so aliened by his father. It was expressly held, that neither this nor any other writ of entry would lay for the issue till he was of full age, excepting the case of the issue of a disseisee, as directed by stat. Westm. 1. c. 47. (b) Where the father aliened land descended to him in tail, and died leaving issue, the issue were to have a *formedon in descendre*, and not a writ of entry *dum fuit infra ætatem*.

(a) O. N. B. 125.

(b) Vid. ant. vol. II. 117.

If an infant aliened his land, he might enter, and if ousted, might, when of age, have an assise of novel disseisin; but if he had not made such entry, he could, when of age, only have this writ of entry. And yet in the third year of this king, where an heir did not enter till he was of full age, and an assise was brought against him, the judges held, it could not be maintained, because the tenant was not seised of the freehold after the heir was of age; that is, the space of a year and a day had not elapsed, and therefore that the freehold could not accrue (a).

The writ of entry *super disseisinam in le quibus*, was that which approached the nearest Entry in le quibus. to the assise of novel disseisin, and is the first writ of entry mentioned by Bracton as a remedy, where the assise failed by the death of one of the parties (b). The form of it was this: *Præcipe A. quòd, &c. reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, DE QUO idem A. injustè et sine judicio disseisivit C. patrem prædicti B. cujus hæres ipse est, post primam transfretationem domini regis, &c. in Vasconiam.* This writ was always to contain the words *DE QUO*, or *DE QUIBUS A. disseisivit B. patrem, &c.* and from thence was named *disseisinam in le quo*, or *in le quibus*.

Where a person was disseised and died, this writ lay for his heir against the disseisor; and it lay for none but the heir of the disseisee; so that in this writ, the demandant was always to make title as heir to his father. It lay notwithstanding the nonage of the heir, as appears from stat. Westm. 1. c. 47 (c). This was on account of the fresh suit; for if it was brought against the issue of the alienee of the disseisor, the parol would demur for his nonage, this not being within the statute (d).

Before we proceed any further to inquire into the nature of different writs of entry, it may be proper to con-

(a) O. N. B. 126.

(b) Vid. ant. vol. I. 340.

(c) Vid. ant. vol. II. 117.

(d) O. N. B. 128. b.

sider more particularly those changes to which they were all equally liable; namely, under what circumstances it was that they were to be drawn in their simple form, or were to be in the *per*, the *per et cui*, or in the *post* (a).

The above form of the writ of entry *super disseisinam*, is the simple one: the same, if in the *per*, was thus: *Præcipe A. &c. quodd justè et sine dilatione reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quo idem A. non habet ingressum nisi PER E. qui illud ei dimisit qui inde injustè et sine judicio disseisivit C. patrem prædicti B. cujus hæres ipse est, post primam transfretationem, &c. et unde queritur, &c.* It was the characteristic of this writ always to allege, *et in quod idem A. non habet ingressum nisi per E. qui illud ei dimisit, qui injustè, &c.* This writ was the proper remedy when the disseisor aliened to another, or died and his heir entered; for then the disseisee or his heir might have this writ against the alienee, or the heir of the disseisor; and he could have it against no other person. During the life of the disseisor no writ of entry lay for the disseisin, but only an assise of novel disseisin. The assise in such case might be brought against him and the alienee both; and if the disseisor would not pay all the damages, the alienee must, according to the stat. Gloc. c. 1 (b). But if the disseisor aliened and died, and the alienee aliened to another person; or if the disseisor died, and the heir entered and died, and *his* heir entered; then the disseisee or his heir was to have a writ of entry *sur disseisin* in the *per et cui*; and the writ was to allege, *et in quod non habet ingressum nisi PER talem, CUI talis illud ei dimisit, qui inde, &c.* These writs in the *per*, and *per & cui*, could be maintained against none but the real tenant, who was in by purchase or descent of the inheritance, as appears by the wording of the two writs, one stating a descent, the other a demise.

(a) Vid. ant. vol. I, 393, 397. and vol. II. 72.

(b) Vid. ant. vol. II. 148.

If the alienation or descent was without the degrees, so as the writ could not be in the *per*, nor in the *per et cui*, it was then to be in the *post*; and it was a rule, that when an alienation or descent was without the degrees, and in the *post*, no writ should ever after be had on such alienation, or descent, in the *per*, or *per et cui*. There were five events that put a writ out of the degrees, namely, intrusion, election, judgment, *disseisin sur disseisin*, and escheat.

Thus, as to *intrusion*; if the disseisor died seised, and a stranger abated, the disseisee or his heir could have no writ in the *per*, but must bring it in the *post*; for the abator was in neither by descent nor purchase, but by a wrong of his own. As to *election*; if the disseisor was a man of religion, and died, and his successor entered, the disseisee or his heir could have no recovery against the successor by any writ but one in the *post*; because the entry of the successor could never be supposed congeable by the predecessor, so as that he should be adjudged in by his predecessor, the same as a son is in by his father. As to *judgment*; if a man recovered against the disseisor, and the disseisor died, the disseisee or his heir could have no other writ of entry *sur disseisin* but one in the *post*, because the tenant entered neither by descent nor purchase, but by judgment. There were, however, some cases where a judgment did not put a writ out of the degrees. Thus, where an abator had issue and died, and the issue was ousted by a stranger, against whom the issue recovered by assise of novel disseisin; if a writ of entry *sur disseisin* was brought against the issue, it should be within the degrees, because this recovery put the issue in his first estate, namely, in the same descent in which he was after the death of his father. As to *disseisin sur disseisin*; if the disseisor was disseised, and died, the first disseisee or his heir could have no recovery but by a writ in the *post*; for the tenant entered neither by descent nor by feoffment, but only by disseisin. As to *escheat*; if the disseisor died

without heirs, or committed felony, and was attainted, and then died, and the lord entered, as into his escheat, the disseisee or his heir could have no writ of entry but in the *post*; for the lord was in neither by descent nor by feoffment, but by escheat (a).

The writ of entry *sine assensu capituli*, was in use in the time of Bracton (b). The writ was as follows: *Præcipe A. quodd justè, &c. reddat B. abbati sancti Augustini de N. unum messuagium, &c. quod clamat esse jus monasterii sui prædicti, et in quod idem A. non habet ingressum nisi per C. quondam abbatem monasterii prædicti, qui illud ei dimisit SINE ASSENSU et voluntate CAPITULI monasterii prædicti, ut dicit, &c.* Where an abbot, prior, or any one who had a convent or common seal, aliened lands or tenements belonging to his church without the assent of the convent or chapter, and then died, his successor might have this writ (c).

Entry *sur cui*
in vitâ.

The writ of entry *sur cui in vitâ*, like the former, was in use in Bracton's time, and has been frequently mentioned since (d). The form of the writ was thus: *Præcipe A. quodd justè, &c. reddat B. quæ fuit uxor D. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quod idem A. non habet ingressum nisi per prædictum D. quondam virum ipsius B. qui illud ei dimisit, CUI ipsa IN VITA suâ contradicere non potuit, ut dicit, &c.* Where the wife was seised for term of life, or in tail, or in fee, and took a husband, and the husband aliened and died, this writ might be brought to recover the land. Notwithstanding this writ was grounded upon the widow's own seisin, yet she was to make title by purchase or descent; and if it was a fee-simple, the writ was always required to allege, *quod clamat esse jus et hæreditatem suam*; if it was only an estate for life, *quod clamat tenere ad terminum vitæ suæ*; and so *mutatis mutandis*, if in fee-tail.

(a) O. N. B. 129. b.

(b) Vid. ant. vol. I. 395.

(c) O. N. B. 131. b.

(d) Vid. ant. vol. I. 393; and ant. vol. II. 190.

We have before seen, that by stat. Westm. 2. ch. 3. (a) the widow should recover her land after her husband's death, if it was lost by default during the coverture, in an action brought against the husband and wife; but if the recovery was against the husband solely, whether it was by default, or by action tried, the widow might have an assise of novel disseisin, and not *cui in vitâ*; because she was no party to the judgment, and was ousted by the recovery of her freehold.

By stat. Westm. 2. ch. 40. (b) it was ordained, that where a widow brought her *cui in vitâ* against the alienee of the husband, and the alienee vouched the heir of the husband, being an infant, the parol should not demur. But it was otherwise where the widow brought her *cui in vitâ* in the *per et cui*, and the tenant vouched him by whom the entry was supposed, and he vouched over the heir of the husband, being within age, and prayed the parol might demur till the full age of the heir, for in this latter case the parol would demur; because the statute is only to be understood of the alienee of the baron vouching the heir of the baron.

If the widow died, her heir would have the same remedy by writ of entry *sur cui in vitâ*. But if the woman was tenant in tail, and the husband aliened, or the husband and wife lost by default, the heir must resort to a *formedon in descendre*, and could not bring a *cui in vitâ*. If the issue brought a *cui in vitâ* on an alienation by the father, he was not to be barred by the warranty of his father, as appears by the stat. of Gloc. ch. 3. (c) unless he had land to that amount in fee-simple to descend on him from his father; for if it was from any other ancestor, or in fee-tail, it was not a bar. If a husband leased land held in right of his wife for term of years, and afterwards made a confirmation

(a) Vid. ant. vol. II. 190. (b) Ibid. 191. (c) Ibid. 156.

for life, or in fee, and died; it was held, that the widow could not have a *cui in vitâ*, but must bring an assise of novel disseisin, and the heir a writ of entry *sur disseisin*; for the writ was not to suppose such alienation to be made by confirmation, or release (a).

A new writ of entry had lately made its appearance, adapted to cases where a divorce happened between the man and woman after the alienation; for then the woman, instead of a *cui in vitâ*, might have a writ called *cui ante divortium* to recover the land. This agreed entirely with the former; only instead of *cui in vitâ*, it alleged *cui ipsa ante divortium inter eos celebratum*, &c. and the writ, in its nature and practice, was precisely the same with the foregoing, to which it was a sort of appendage (b).

We find another new writ of entry of the following tenor: *Præcipe A. quòd justè, &c. reddat B. unum messuagium, &c. quod idem B. ei dimisit CAUSA MATRIMONII INTER EOS PRÆLOCUTI, qui eam duxisse debuit in uxorem, et nondum duxit, ut dicit, &c.* This was from the words of it called a writ of entry *causâ matrimonii prælocuti*. It was no uncommon practice, and seems to have originated from gifts *in maritagium* (c), for a woman to give lands or tenements, or a rent to a man, on condition that he should marry her within a given period. If after this the man would not marry her within the time, or if he disabled himself by marrying another, or entering into religion, or by being ordained presbyter, the woman or her heirs might recover the land by this writ; and might follow it by a writ in the *per*, *per et cui*, or the *post*, into whatsoever hands it went. This condition to marry was to be by deed indented, or the writ could not be supported (d).

In the time of Bracton there were two writs of intrusion: one was *pone per vadium*, &c. which was to be

(a) O. N. B. 131. b.

(b) O. N. B. 134.

(c) Vid. ant. vol. I. 296.

(d) O. N. B. 155.

brought recently after the intrusion (a); the other was a writ of entry, and was the remedy when the claimant had chosen to lay by for a space of time (b). The former of these seems now to have gone out of use, and the latter alone continued, which was in this form: *Præcipe A. quòd justè, &c. reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quod idem A. non habet ingressum nisi PER INTRUSIONEM, quam in illud fecit post mortem C. quæ fuit uxor G. quæ illud tenuit in dotem de dono prædicti G. quondam viri sui, patris prædicti B. cujus hæres ipse est, ut dicit, &c.* Where a tenant for term of life in dower, or tenant by the courtesy, died seised of lands or tenements, and a stranger entered, the person in reversion might have this writ against the abator, or whoever entered after the decease. If an intrusion was made *tempore vacationis*, the successor might have this writ against an abator into any lands or tenements belonging to his church; and this was by the stat. Marl. ch. 28 (c).

We find a writ called a writ of entry *ad communem legem*, which was in this form: *Præcipe* ^{Entry ad communem legem.} *A. quòd justè, &c. reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quod A. non habet ingressum nisi per C. quæ fuit uxor D. quæ illud ei dimisit, et quod illa in dotem tenuit de dono prædicti D. quondam viri sui, patris prædicti B. cujus hæres ipse est, ut dicit, &c.* Where a tenant for term of life, by the courtesy, or in dower, aliened in fee and died, the reversioner might have this writ to recover the land, into whatsoever hands it passed; and this was by stat. West. 2. ch. 3 (d). In the case of a tenant for life losing by default and dying, the reversioner might, at his option, have a writ of entry *ad terminum qui præteriit*, or a writ of entry *ad communem legem*; but a tenant by the courtesy, or in dower, could not

(a) Vid. ant. vol. I. 320.
ant. vol. II. 73. O. N. B. 135. b.

(b) Vid. ant. vol. I. 396.

(c) Vid.

(d) Vid. ant. vol. II. 190, 191.

properly be called a *termor*; so that the former writ of *ad terminum qui præterit* could not lie against *them*, but only the writ of *ad communem legem*, as provided by the above statute. Further, should a tenant by the courtesy alien, or lose by default, and die, the person in reversion might have recovery by assise of mortaucestor, *ael*, or *cosinage*, and the like writs, notwithstanding the seisin of the tenant by the courtesy, as appears by the stat. Gloc. c. 3. (a) or he might have this writ of entry *ad communem legem* (b).

The writ of entry *in casu proviso* was given by the stat. Gloc. ch. 7 (c). The form was as follows: *Præcipe A. quòd justè, &c. reddat B. unum messuagium, &c. quod clamat esse jus et hæreditatem suam, in quod idem A. non habet ingressum nisi per C. quæ fuit uxor D. quæ illud ei dimisit, quæ illud tenuit in dotem de dono prædicti D. quondam viri sui, patris prædicti B. cujus hæres ipse est, et quod post dimissionem per ipsam C. præfato A. contra formam statuti Glocestriæ de communi consilio regni Angliæ, inde PROVISI FACTAM in fædo ad præfatum B. reverti debeat per formam ejusdem statuti, ut dicit, &c.* Where a tenant in dower aliened in fee, or for term of another's life, the reversioner, by the statute of Gloucester, might bring this writ against the person in possession. It was always to be brought in the life of the tenant in dower (d).

• Entry in consimili casu. The writ of entry *in consimili casu* was of kin to the former, and owed its origin to the stat. Westm. 2. c. 29. (e) which permitted writs to be made in *consimili casu*. Accordingly, as the former was a remedy where a tenant in dower aliened, this was a remedy for the reversioner, where a tenant for term of life, or by the courtesy, aliened in fee. This, like the former, must be brought during the life of the tenant by the courtesy, or for life. The form was this: *Præcipe A. quòd justè, &c. reddat B.*

(a) Vid. ant. vol. II. 146. (b) O. N. B. 136. (c) Vid. ant. vol. II. 147.

(d) O. N. B. 137. (e) Vid. ant. vol. II. 202.

unum messuagium, &c. quod clamat esse jus et hæreditatem suam, et in quod idem A. non habet ingressum nisi per C. qui illud tenuit per legem Angliæ post mortem D. quondam uxoris suæ, matris prædicti B. cujus hæres ipse est, et quod post dimissionem per ipsum C. præfato A. inde factam in fædo ad præfatum B. reverti debeat per formam statuti in consimili casu provisi, &c (a).

Thus far of writs of entry; the fashionable remedies in those days, in most cases of ouster of freehold. To these may be subjoined, as nearly allied both to the writ of entry and writ of right, a writ in use for recovery of a freehold, called *quodd ei deforceat*, which was given by stat. Westm. 2. c. 2. (b) to tenants in tail, in frank-marriage, dower, courtesy, or for term of life, when they had lost by default. This writ came in lieu, and may be considered in the nature of a writ of right. It could be brought only by the very person who lost the land (c).

The grand remedies for persons claiming under entails, were the writs of *formedon in* Writs of formedon. *descendre, remainder and reverter*. The forms of these writs have been already shewn (d); and nothing remains to add, but some few observations on their distinct natures, as laid down by the lawyers of this reign.

In all cases of a gift of lands, tenements, or a rent in frank-marriage, or to a man and woman and the heirs of their bodies engendered, or to a man and the heirs of his body; if, after the death of such man or woman, leaving issue, a stranger abated; or if an alienation was made, with fine or without; or if there was a disseisin, or recovery by default, after default; then after the death of the donee, the issue might have his writ of *formedon in descendre* to recover the land.

The issue could recover on the possession of his ancestor

(a) O. N. B. 137. b.

(b) Vid. ant. vol. II. 193.

(c) O. N. B. 140. b.

(d) Vid. ant. vol. II. 166. 320, 321.

by no writ but this. But of his own possession he might, if ousted, have an assise of novel disseisin, or writ of entry, as the case might be; so that this was now considered as a writ (a) of right for the heir in tail. It was now taken for settled law, as has been before observed (b), that in this writ it was a good bar to plead the feoffment of the ancestor with warranty, with an averment that the issue had assets by descent in fee-simple. If a tenant in tail in possession entered into religion, his issue might have this writ, alleging, *quòd pater suus habitum religionis assumpsit, &c.* But if the father made a feoffment before he took the habit of religion, the issue could not have this writ till his father was dead. In this writ, the taking of the profits was to be laid only in the person of the first donee, and the demandant was to make himself heir in tail to the person last seised. In this writ, and that *in reverter*, the demandant need not shew a deed; but in that *in remainder*, he must shew a deed (c).

The writ of *formedon in remainder* lay for the remainder-man, whether the remainder was in fee, in tail, or only for life, against any one who entered after the death of the person seised of the preceding estate, if he was seised only for life, or if he was seised in fee-tail, and died without issue. If the tenant in tail in remainder was once seised and died, his issue could have no writ but a *formedon in descendre*; but if he had never been seised, he could have no writ but a *formedon in remainder*. This writ, as was before said, could not be maintained without a specialty to prove the limitation *in remainder*. If there was a tenant for life, with remainder over, and the tenant for life was impleaded, and vouched the lessor, and recovered in value; the remainder-man, after the death of the tenant for life, might demand such land recovered in value in a *for-*

(a) Vid. ant. vol. II. 321.

(b) Vid. ant. 11.

(c) O. N. B. 143.

medon in remainder, the same as he might the original lands; because the tenant for life recovered by virtue of the same entail on which the remainder was limited. But it was otherwise of a reversion that was granted over, because the recovery was founded on another deed than that by which the reversion was granted; and therefore such recovery in value would go to the lessor: yet if the tenant for life had vouched the grantee of the reversion, and he had vouched over the lessor, the recompence would go to the grantee, and not to the lessor. If a tenant in tail with remainder over aliened with warranty, and died without issue, so as that the remainder-man was his heir, this warranty would be a bar without assets; because it was out of the provision of the statute, and at common law every warranty was a bar. The remainder-man, in like manner, might be barred by the deed of an ancestor who was no party to the entail.

Notwithstanding the demandant could not require an answer of the tenant, unless he had a deed, yet the tenant could take no issue on the remainder, but he was to answer to the gift. Where this writ was brought after the death of tenant for life, for a fee-simple, or fee-tail, the demandant was to allege esplees in the person of the donor, as in case of a fee-simple, and in the person of the tenant for life, as in a freehold. But if he claimed as tenant for life, he was to lay esplees only in the person who made the deed (a).

The writ of *formedon in reverter* lay for the reversioner, or his heir, after the death of a tenant in tail, and never after the death of a tenant for life, or any other term. In this writ, the esplees were to be laid both in the person of the donor and donee (b).

The writ of dower *unde nihil habet*, the writ of right of dower, and admeasurement of dower, seem to be in their

(a) O. N. B. 147. b.

(b) Ibid. 149. b.

form, process, and learning, the same as has been already shewn (a). The writ of right of dower was to be directed to the heir, or, if he was in ward, to his guardian; but if the heir had no court, then to the chief lord; and it was removeable the same as a writ of right patent, as will be more fully shewn hereafter. The writ of right of advowson and the assise of *darrein presentment* were much in the same condition as in Bracton's time (b). But the old writ of *quare non permittit* was now called *quare impedit*; and the *quare impedit*, as it was used in Bracton's time, together with the appellation of *quare non permittit*, as a distinct writ, had long become obsolete (c). The other auxiliary writs in these clerical remedies, as used in the time of Bracton, were still in force (d). A writ had been framed since his time, called *quare incumbravit*; and lay against the bishop for filling the church, while a suit was depending for the presentation. This writ was formed upon the model of the prohibitory writ mentioned by Bracton under the name of *ne incumbraret*. The process in this new writ was summons, attachment, and distress (e). Another auxiliary writ had been contrived, and called, *de vi laicâ removendâ*: this was resorted to, when a suit was depending between two persons for a church, and one of them came with force, as was sometimes done, and took possession. This writ directed the sheriff to remove such force, and, if he was resisted, to take the *posse comitatûs*, and attach the offenders, so as to have their bodies *coram nobis* to answer for their offence. This writ was never granted without a certificate from the bishop, testifying such resistance (f).

The writ of *juris utrûm*, which had been gradually opened by several statutes, was still further enlarged by the construction of those statutes. The statute 14th of this

(a) Vid. ant. vol. I. 378. 383, 384. (b) Vid. ant. vol. I. 384. 354. (c) Vid. ant. vol. I. 355. and vol. II. 194. (d) Vid. ant. vol. I. 357. (e) O. N. B. 33. (f) O. N. B. 37.

king, st. 1. ch. 17. (a) which allowed this writ, amongst other persons, to guardians or *wardens of chapels*, was held to extend to wardens of *hospitals*; such a variation being justified (it was said) by the statute of Westminster (b), as being *in consimili casu*. Those who had a convent, or foundation with a common seal, could not maintain this writ, but such persons were obliged to resort to the writ of entry *sine assensu capituli*, &c (c). The process in this writ was summons, and resummons, as in a writ of *mortauncestor*.

We now come to consider the nature of writs ^{Writs of right.} of right, as explained in the writings of this period. A writ of right was said to be either *patent* or *close*. A writ of right *close* was directed to the sheriff; a writ of right *patent* was directed to the lord of whom the land in question was holden; commanding him to do right and justice between the parties. This writ might be removed out of the lord's court into the county by *tolt*, and out of the county to the common bench by *pone*, if the demandant so pleased; for which reason the writ contained the clause of *et nisi feceris, vicecomes, &c. faciat, &c.*: for the writ being all along in the custody of the demandant, he might remove the plea without stating the cause in the *pone*; though, if the *pone* was at the suit of the tenant, it must contain the cause of removal. The plea might also be removed *per saltum* out of the lord's court to the common pleas, by *recordari* with cause, at the suit of the tenant (d). How far this corresponds with the account before given of writs of right in the lord's court in the time of *Glanville* and *Bracton*, may be seen on comparing them (e). The wording of the writ now in use agreed exactly with that in *Glanville*.

We find a writ of right, intitled, *Quia dominus remisit curiam suam domino regi*, which has not been before

(a) Vid. ant. vol. II. 436.

(b) Viz. ch. 24. Vid. ant. vol. II. 202.

(c) O. N. B. 39. b.

(d) O. N. B. 2.

(e) Vid. ant. vol. I. 172. 399, &c. 402.

mentioned by that name, though it was the kind of writ which might have been resorted to in Glanville's time, when a court was proved *de recto defecisse* (a). This writ of right, *quia dominus remisit curiam*, lay where lands or tenements, holden of some inferior lord, were demanded in a writ of right, and the lord held no court: in such case he, at the request of either of the parties to the writ, would transmit the writ to the king's court, *remitting his court*, for that time, *to the king's court* (b), with a saving of his seignory on any future occasion; upon which there issued this writ, *Quia dominus, &c.* returnable before the justices of the common pleas: this writ was always *close*. This writ agreed with the common form of a writ of right, only there was added after *teste meipso, &c.* a clause signifying the reason of issuing the writ, *quia capitalis dominus fædi illius inde remisit nobis curiam suam, &c.* The process in this was summons, *grand cape* and *petit cape* the same as in other writs of right (c).

There was a writ of right in London, directed to the mayor and sheriff of the city, which was *patent*, and not *close*; for though the cause of the distinction was, that the latter writs were directed to the sheriff, and the former not, yet this, being directed to the mayor as well as the sheriff, was *patent*. This writ also did not contain the clause *nisi feceritis, vicecomes faciet, &c.* and therefore it could not be removed like the others. It was, however, removable in some particular cases. Thus, where a foreigner happened to be vouched, the mayor and sheriffs were to adjourn to a certain day before the justices of the bench, and send the record, which, when the warranty was determined, was to be returned by a judicial writ, commanding the mayor

(a) *Vid. ant.* vol. I. 171, 172.

(b) Where a lord adjourned a *disseisin* matter into the superior court, it was termed by Glanville, *curiam suam ponere in curiam domini regis*. *Vid. ant.* vol. I. 153.

(c) O. N. B. 18.

and sheriffs to proceed, the justices having no further authority (a). This course corresponded with that which was directed in the like case of foreign voucher in Bracton's time (b).

The writ of right *de rationabili parte* is only hinted at by Bracton (c), and not mentioned by Glanville. This writ lay between privies in blood, as between brothers and sisters, between nephews and nieces, and never between strangers. It lay even though the ancestor had made a lease for the life of the lessee, and so died not seised of the freehold, leaving coheirs; in which case, should any of the coheirs intrude after the death of the lessee, the others might have this writ. This writ did not lie between relations past the third degree; it lay between brothers and sisters, where one claimed by charter, and the others by descent; for it was principally contrived for trying the privy of blood. It was a writ of right patent, directed to the lord of whom the land was holden, with process of summons, and *grand* and *petit cape*; but it did not admit the duel, or grand assise. The words of this writ were, *Plenum rectum teneas, &c. de uno messuagio, &c. quod clamat esse RATIONABILEM PARTEM suam, quæ tum contingit de libero tenemento, quod fuit N. patris sui, &c. quod ei deforceat, &c* (d).

The writ of right *secundum consuetudinem manerii*, was a writ close. This was confined to the court of ancient demesne. We are told, that every writ sued upon the custom of a manor was called a writ of right close (e), which seems an exception to the above distinction between writs patent and close. In the form of it, it agreed exactly with the writ of right patent, having the additional words above-mentioned, *Præcipimus, &c. quod sine dilatione, et secundum consuetudinem manerii nostri, &c. plenum rectum, &c.*

(a) O. N. B. 4.

(b) Vid. ant. vol. I. 401.

(c) Vid. ant. vol. I. 426.

(d) O. N. B. 10.

(e) Vid. ant. vol. I. 383.

but this writ could not be removed by the demandant into the county, and common pleas, like the other. Yet, if he complained that right was not done, he might have a writ out of the chancery to the sheriff, commanding him to go in person with four knights of the county, to see that right be done (*a*). The writ of right of *præcipe in capite*, which was for the king's own tenants, was a writ close, and agreed in its practice with the proceedings so fully related before (*b*).

Other real writs. Besides the above, there were several others which were considered as writs of right, merely because they were taken by reason of a seignory. In some of these the grand assise and duel lay; in some they did not, but the issue was to be tried by a common jury; according as the demandant counted of his own seisin, or of that of an ancestor.

These we shall now enumerate, as they occur among several other writs for the recovery of land and other heritable rights, without attempting to arrange them in any particular order.

The writ *de rationabilibus divisio*, mentioned by Glanville (*c*), for settling boundaries was still in use: the process in it was summons, *grand* and *petit cape* (*d*). There was another writ that was applicable to the same occasion, and existed in Bracton's time (*e*), called *de perambulatione faciendâ*, in which there was no process; but the sheriff was to go to the place where the incroachment had been made; and there, in the presence of the parties and chief men dwelling in the neighbourhood, he was to make perambulation, and mark the boundaries of seignories, as they had been in former times. This was an amicable proceeding, and the writ was always obtained by agree-

(*a*) O. N. B. 11. (*b*) O. N. B. 12. b. Vid. ant. vol. I. 399. 114. (*c*) Vid. ant. vol. I. 174. (*d*) O. N. B. 85. b. (*e*) Vid. ant. vol. I.

ment of the parties; which agreement was to be entered into in the chancery, and there inrolled, before the writ would be granted (a).

There was a writ contrived for persons living in towns where by custom lands were devisable: this was the writ *ex gravi querelâ*, of which there is no mention before this reign. If such lands were devised, and the heir or any other entered thereon, the devisee or his heir might have this writ against the intruder, who was summoned before the mayor, or other principal officer of the town, to shew cause, at a certain day, wherefore execution should not be done pursuant to the will; and if no cause was shewn, the devisee was put into possession (b). The writ of *nuper obiit* is only glanced at by Bracton (c), without any discourse upon it. This was nearly allied to the writ *de rationabili parte*; it lay between privies in blood, as that did, and the wording of both is the same: the difference between them consisted in this; that the writ *de rationabili parte* was a writ of right, and lay though the ancestor did not die seised; the present was a *possessory* remedy, and could not be supported unless the ancestor had died seised of the land in question. A *nuper obiit* was to be brought by all those that were deforced, and not by one only: though some might not chuse to sue, yet all were to be named; and he who sued might have a *summoneas ad sequendum simul*. If they did not comply after this, the person suing might have judgment and execution for his own portion singly. The process in this writ was summons, *grand* and *petit cape*. As the writs of *mortauncestor*, *ael* and *cosinage*, were always to be brought against strangers, they differed in that respect from these two *family* writs (if they may be so called); for a *nuper obiit* and *de rationabili parte* always lay between privies in blood.

(a) O. N. B. 83.

(b) O. N. B. 27.

(c) Vid. ant. vol. I. 433.

The writs of *cessavit per biennium*, and of *cessavit per biennium de fædi firmâ*, given by statute in the reign of Edward I. (a) were still in use. The former of these was the more general and more common. There now appeared another writ of this kind, called *cessavit de cantariâ per biennium*. This was, when lands were given to a church, for some religious service; as to pray for the donor's soul, to give alms, to perform divine service, or the like. If this was intermitted for two years, and there was no distress on the ground, the donor's heir might have this writ against the *terre-tenant*. This, like the two former writs, made general mention of the statute; *quæ ad præfatum R. reverti debet per formam statuti de communi concilio regni provisi*; and like the writs of entry before-mentioned, they might be in the *per*, *per et cui*, and *post* (b). Similar to the last of these writs, but grounded upon another statute (c), was that *contra forma collationis*; which was, where an alienation was made by an abbot, or other religious person, of lands left in pure alms, for divine purposes: this writ lay against the sovereign of the religious society, and not against the tenant of the land.

The remedies for the recovery of common deserve a particular attention. The principal of these was the *Quodd permittat*. The form of this writ was, *Præcipe, &c. quodd justè, &c. permittat B. habere communiam pasturæ in N. de quâ C. pater prædicti B. cujus hæres ipse est, fuit seisitus ut de fædo tanquam pertinente ad liberum tenementum suum in eâdem villâ die quo obiit, ut dicit, &c.* This was the remedy where a man was disseised of common of pasture, and the disseisor aliened and died, or died and his heir entered; and it lay either for the disseisee or his heir. If neither of those events had happened, the remedy was by assise of common.

(a) Vid. ant. vol. II. 145.

(b) O. N. B. 140.

(c) Vid. ant. vol. II. 156

It may be remarked here, that there was in the time of Glanville and Bracton (a) a writ, *quòd permittat habere rationabile estoverium*, either *in bosco*, or *in turbariâ*; but in the place of that writ, the resort after stat. Westm. 2. ch. 25. was to the assise of novel disseisin (b). That act ordains, that if any one was disseised of his turbary, piscary, or the like, appertaining to a freehold, he should have an assise of novel disseisin. The writ of *quod permittat* had been extended by stat. Westm. 2. ch. 24. (c) which enacted, that where a parson was disseised of common of pasture, he should during the life of the disseisor have an assise, and his successor should have a *quòd permittat*, either against the disseisor, or his heir. Where several persons had common by special deed, or covenant, and the lord built a mill, or otherwise injured the common, the commoners could not have an assise, but could only proceed on their covenant, or specialty, as appears by stat. West. 2. ch. 46 (d).

The writ of *quod permittat* might be in the *debet* and *solet*, or in the *debet* without the *solet*, according to the nature of the demandant's claim. Thus, if the disseisor died and his heir entered, the writ should mention the disseisin: if, after the death of the disseisor and his heir, a stranger entered, the writ would make mention of the *debet et solet*, to try the right. If the demand was in right of the demandant's ancestor, who was seised in fee the day he died, the writ was not to make mention of the disseisin of the ancestor, but was in the nature of a mortdaunce; if the ancestor was disseised, then the writ was to mention his disseisin. When the writ was in the *debet*, without the *solet*, the demandant was invariably to count of the seisin of his ancestor, and in this the battel and great assise would lie. This writ, like that of trespass, had the process of attachment and distress, and not *grand* and *petit cape*.

(a) Vid. ant. vol. I. 343, 344.
ant. vol. II. 202.

(b) Vid. ant. vol. II. 204.

(c) Vid.

(d) Vid. ant. vol. II. 209.

If a person having a freehold was ousted of his common of pasture by his lord, or if the lord approved contrary to the stat. Mert. ch. 4. and stat. Westm. 2. ch. 46. so that the tenant had not sufficient pasture, he might have an assise of novel disseisin; and if the pasture was surcharged by a freeholder, his remedy was by writ of admeasurement of pasture. But if the tenant surcharged the pasture, the lord's remedy was not by admeasurement, but by assise of freehold. He had no other remedy, and some doubted even of this remedy. A writ of *quòd permittat*, in the nature of a mortuance, could never be pleaded in the county: that *ad certum numerum averiorum* might be pleaded either in the bench, in the county, or in the iter (a).

Where a person had common of pasture time out of mind in the several land of another, the person who had the several land might bring a writ of *quo jure* (b) (a writ mentioned by Bracton as applicable to this purpose), and force the commoner to shew by what title he claimed his common. It was in this form: *Si A. fecerit te securum, &c. tunc sumhone, &c. B. quòd sit, &c. ostensurus QUO JURE exigit communiam pasturæ in terrâ ipsius A. &c. sicut idem B. nullam habet communiam in terrâ ipsius A. nec idem B. servitia ei fecit, quare communiam in terrâ A. habere debet, ut dicit, &c.* A lord who meant to question his tenant's claim of common could not oust him at once, because he would then be liable to an assise of novel disseisin; his remedy therefore was by this writ, which was given in order to try the right. The process was summons, attachment, and distress; and if the party had pleaded and then made default, there issued the grand distress, and not a *petit cape* (c). This writ was to be determined by the battel, or great assise, as other writs of right (d).

The writ of *admeasurement of pasture* might be brought by a commoner who had common appendant to his free-

(a) O. N. B. 68. (b) Vid. ant. vol. I. 343. (c) Vid. stat. Westm. 2. ch. 46. Vid. ant. vol. II. 202. (d) O. N. B. 70. b.

hold, and complained that another commoner had surcharged the common: the consequence of this writ was, that as all the commoners were admeasured, the process was that which had been ordained by stat. Westm. 2. ch. 7 (a). summons, attachment, and distress peremptory, with proclamation made in two counties; and if the party did not appear to the proclamation, the admeasurement was made by default (b).

When admeasurement had been made under a writ directed to the sheriff, as just mentioned, and the person who surcharged was again guilty of surcharge, then the party grieved might have a writ called *de secundâ superoneratione pasturæ*. This writ was sometimes original, and sometimes judicial. The practice on this writ seemed to rest wholly on the stat. Westm. 2. ch. 8 (c).

After the regulations that had been made in the time of Edward I. about waste, the remedies in such cases stood thus: There was a writ of waste, grounded on Westm. 2. c. 14 (d). This writ was for the reversioner against tenants for life, in dower, by the courtesy, guardians in chivalry, or tenants for years (e): it had the process of summons, attachment, and distress, and on default, the proceeding directed by that act (f). Next to this was the writ of *estrepement*, given by the statute of Gloucester, ch. 13. (g) which was a sort of prohibition to stop waste, while a *præcipe quodd reddat, &c.* was depending for the lands. This writ, in term-time, was judicial, issuing out of the roll of the principal cause; if it was not term-time, it issued out of chancery. The process was attachment and distress; and, for default of distress, process of outlawry (h).

The writ in use for recovery of services, where the person or his ancestor had not been seised within the limitation

(a) Vid. ant. vol. II. 197. (b) O. N. B. 71. b. (c) Vid. ant. vol. II. 198. O. N. B. 72. b. (d) Vid. ant. vol. II. 180. (e) Vid. ant. vol. II. 148. (f) O. N. B. 41. (g) Vid. ant. vol. II. 152. (h) O. N. B. 43.

of an assise, was that *de consuetudinibus et servitiis*, being a writ of right, in which might be had the duel and the great assise (*a*). Where a person was distrained for more services than he was bound to by his original infeoffment, he might have the writ *contra formam feoffamenti*, given by the stat. of Marl. ch. 9 (*b*). The other writ in cases of services was the writ of *mesne*, with the proceedings so fully stated in the reign of Edward I (*c*). Next follow the *quid juris clamat*, the *per quæ servitia*, and *quem redditum reddit*: each of these writs was to obtain an attornment of the tenant (*d*), after a grant of the reversion by fine. These were judicial, and issued out of the record of the fine. The process was summons and distringas. The writ of right *sur disclaimer* was known in Bracton's time, but not by that or any particular name to distinguish it from others (*e*). This writ lay, when the lord had avowed, and the tenant *disclaimed* to hold of him; upon which, there being an end of the suit in replevin, the lord was driven to this writ, and, if he made out his title, recovered the land. This was where the suit had been in the common-pleas; for if it was in the county, or court baron, where the proceeding was not of record, the lord would be in mercy, as in Bracton's time (*f*). There were other actions, besides replevin, for recovery of services, where the tenant might *disclaim*: one of which was a *cessavit*: in all such actions the lord must resort to this special writ of right.

The old writs of ward were still the usual remedies in such cases; namely, the writ *de communi custodiâ*, *ravishment of ward*, and *ejectment of ward*. All these have been sufficiently discoursed of already (*g*). But there now appeared a new writ, called *entrusion de garde*, which lay where the infant within age entered into the lands, and held the

(*a*) O. N. B. 86. (*b*) Vid. ant. vol. II. 65. (*c*) Vid. ant. vol. II. 198.

(*d*) O. N. B. 168. 172. (*e*) Vid. ant. vol. II. 47. (*f*) O. N. B. 162.

(*g*) Vid. ant. vol. II. 208.

lord out (a). The writs *for the value of a marriage*, and *for forfeiture of marriage*, made up the remainder of the remedies contrived for guardians. The writ of *escheat* was still the remedy for lords claiming under that title (b).

Other writs in use, but less frequently resorted to than the former, were these: First, the writ of *monstraverunt*, which was for tenants in ancient demesne, when they were distrained for other services and customs than they performed in the time of William the Conqueror (c). The writ of *ne injustè vexes*, which was for common tenants when they were distrained by their lords to do more services and customs than they were wont to do. We find this writ in the time of Glanville (d): it was considered as a writ of right patent and ancestral, and might be determined by the battel or grand assise: the process in this and the *monstraverunt* was one prohibition, one attachment, and then a distress (e). We find also the writ of *secta ad molendinum* (f), the writ *de contributione faciendâ* (g), and that *de partitione faciendâ*, for parceners who claimed land (h); that *de warrantia chartæ* (i), and the writ of *diem clausit extremum*, which had no process, but was a writ of office (k). When a person had been found heir to the deceased by the last of these writs, he might, when he came of age, have the writ *de ætate probandâ* to prove that fact: this, like the former, being a writ of office, had no process (l). The writ of *quo minus* was for a person who had a grant to take estovers every year out of another's wood; it was considered as in the nature of a writ of waste; and seems to have come into the place of an old writ, called *quod permittat habere rationabile estoverium*, and just alluded to (m); the process was attachment

(a) O. N. B. 100.

(b) Vid. ant. vol. I. 395.

(c) O. N. B. 16. b.

(d) Vid. ant. vol. I. 174.

(e) O. N. B. 14. b.

(f) Ibid. 67.

(g) Ibid. 114.

(h) Ibid. 157. b.

Vid. ant. vol. I. 312.

(i) Ibid. 161. b.

Vid. ant. vol. I.

450.

(k) Ibid. 162. b.

(l) Ibid. 163. b.

(m) Vid. ant. vol. I.

348. 174.

and distress (a). The writ of *ad quod damnum*, of which so much was said in the time of Edward I. (b) was still in use; as were likewise the writ of *quo warranto* (c); the writ *de idemptitate nominis* (d), which has been mentioned before in this reign (e); that *de libertate probandâ*, and that *de nativo habendo* (f).

Among others was the old writ *de moderatâ misericordiâ* for a person who had been amerced in a county court, or court baron, with great rigour, without due regard to the degree of the offence (g). The writ of *decies tantum* was given by stat. 34 Ed. III. c. 8. (h) and lay, where a jury had taken money of one of the parties for their verdict: they were by this writ to pay ten times as much as they had received; and if they had nothing to pay, they were to be imprisoned for a year. This writ lay also against embracers and procurors of such inquests (i). The writs in ecclesiastical matters were *prohibition*, *indicavit*, and *consultation*; and when a person was excommunicated, there lay a temporal process against him by writ of *excommunicato capiendo*: when he was to be delivered, he might have the writ *de excommunicato deliberando* (k). The two writs of *disceit* and *conspiracy* were still in use (l).

We have hitherto been speaking of original writs for the commencement of judicial proceedings; the following were the writs relating to judgments, and execution thereof. The writ *de executione judicii* lay, where the sheriff or bailiff prolonged the execution of the judgment in favour of the tenant. The writ *de falso judicio* was, where false judgment was given in the county, hundred, or court baron. This writ was to bring the record before the justices in bank, or in eyre, which corresponds with the very

(a) O. N. B. 159. b. (b) Vid. ant. vol. II. 230. (c) O. N. B. 160.
 (d) Ibid. 166. (e) Vid. ant. vol. II. 374. (f) O. N. B. 47. Vid. ant.
 vol. II. 445. (g) Ibid. 53. Vid. ant. vol. I. 248. (h) Vid. ant. vol. II.
 446, 447. (i) O. N. B. 131. b. (k) Ibid. 33. 35, 36, 37. 39. (l) Ibid. 56. 63.

account given of this writ in Glanville's time (*a*). The writ of *error* was for the similar purpose of correcting false judgments. Where false judgment was given in the common pleas, this writ was returnable in the king's bench: if false judgment was given in the king's bench, such judgment was to be reversed in parliament, or by the king's great council upon petition (*b*). The writ *de errore corrigendo* was a writ of error directed to the justices before whom the judgment was passed, commanding them to correct the error therein; and is what has been since called, *error coram vobis*, &c (*c*). The writ of *audita querela*, like the former, was to take off the effect of a judgment; but this was to be upon the allegation of some fact that had taken place since, and intitled the party to avoid the judgment. It was commonly used, where, after a statute-merchant, a compromise or release of the debt had been made; then if execution was sued, this writ might be had returnable in the common pleas (*d*). The writs of *dedimus potestatem* for making an attorney, and for levying a fine, have been mentioned before (*e*). The writ of *quale jus* was devised after the stat. Westm. 2. c. 32. to enforce the provisions of that act. It was a judicial writ, which an abbot or other religious person, after recovery of land by default, was, before execution, to sue to the escheator, to enquire whether he really had a title to the land, or it was lost by collusion (*f*).

Perhaps the reader will be better satisfied with this concise enumeration of real writs, than if they had been treated fully and at length; but those which remain deserve a more particular attention, and will therefore be reserved for more deliberate consideration in the following chapter.

(*a*) Vid. ant. vol. I. 153. (*b*) O. N. B. 18, 19, 20. (*c*) Ibid. 61.
(*d*) Ibid. 74. (*e*) Ibid. 23. 114. Vid. ant. vol. II. 304. (*f*) Ibid.
177. Vid. ant. vol. II. 155.

CHAP. XVI.

EDWARD III.

*Action of Debt—of Detinue—of Accompt—of Trespass—
Of Actions on the Case—Proceedings by Bill, &c.—Of
Pleading—The Secta, and Law-Wager—Trial by Proofs,
and other Trials—Trial per Pais—Of the Venue—Of
Process—The Crime of Treason—Homicide—Larceny
—Burglary—Appeals—Indictments—Of Penance—
Trial by Battel and Jury—Sanctuary and Clergy—Of
Forfeiture—The King and Government—The Nova
Statuta—Reports—Old Tenures—Natura Brevium—
Novæ Narrationes—Miscellaneous Facts.*

HAVING dismissed the numerous real actions that were now in use, we come to personal actions: these constitute a subject of inquiry that has survived the changes to which the former have long yielded; and a considerable portion of what we shall say upon them, makes a part of the law of the present time. The personal actions now in practice were the action of debt, of detinue, annuity, accompt, replevin, trespass, and trespass upon the case. Of these we shall speak in their order, beginning with the action of debt.

Action of debt. The action of debt was the common remedy in most contracts for the recovery of money; and since its process had been strengthened by a statute of this king, it became more efficacious and useful. The process now was summons, attachment, and distress; and on default of distress, three *capias*'s, and an *exigent* proclaimed in five counties, and then to outlawry.

The writ of debt was the same in form, as in the reign

of Edward I (a). We have now an opportunity of seeing the forms of some *declarations* in this action, which are furnished by a book of precedents collected in this reign: some specimens of these may not be unacceptable to the curious. The formal beginning of such a declaration was the same as the beginning of a petition to parliament, *Ceo vouz monstre I. R. &c.* Being of a date previous to stat. 36 Ed. III. these declarations are in French: a literal translation may serve as well for specimens, as the original. *Ceo vouz monstre, &c. This sheweth unto you, A. who is here, that B. who is there, unjustly (b) detains from him, and will not render him 10l. of money which he owes him; and therefore unjustly, because at such a day, year and place, the said B. granted himself to be bound to the aforesaid A. in 10l. to be paid at such a day, year, and place; at which day the said A. went to the aforesaid B. and requested him to pay him the aforesaid 10l. and he would not pay it, nor yet will, à tort et à ses damages of 100 shillings; and if he denies it, he can bring GOOD SUIT, &c.*

The declaration, or counting upon the writ of debt was various, according to the special nature of the demand: the following are the substance of different declarations. Upon a *lending*, it might be thus: *Therefore unjustly, because on such a day, year, and place, the said A. LENT to the said B. 10l. to be paid on such a day, at which day he did not pay it, &c.* Upon a *selling*, thus: *Was obligated to the said A. in 10l. for a horse, or for corn, namely, &c, or for a bag of corn, &c. or for ten quarters of corn, which he SOLD to him, to be paid on such a day, at which day, &c. and then go on as before. Again: And therefore wrongfully, for that whereas the said A. was bound to one Robert Fox in 10l. which the said A. BAILED to the aforesaid B. to pay to the aforesaid Robert, the said 10l. to the aforesaid Robert he paid not; by reason of which the said Robert the aforesaid 10l. against the said A. on such a day, and year, and place, before such justices did recover; by reason of which*

(a) Vid. ant. vol. II. 257.

(b) A tort.

the said A. hath often come to the aforesaid B. and requested him to REBAIL the aforesaid 10l. but he has never been willing so to do, nor yet will, A TORT, ET A DAMAGES, &c. Upon a bailment of money, thus: And therefore wrongfully, for that whereas the said A. by a writing obligatory was bound to one Robert in 10l. which the said A. BAILED to the aforesaid B. to pay the aforesaid Robert, so that he might be acquit of the aforesaid 10l. the said B. the said 10l. to the aforesaid Robert did not pay; by reason of which the said Robert the aforesaid 10l. such a day, year, and place, before such justices against the said A. demanded; pending which plea, the said A. came to the said B. and requested him to acquit him of the said 10l. and he would not acquit him; by reason of which the said Robert the aforesaid 10l. against the said A. for default of acquittance of the said B. did recover; by reason of which the said A. requested that he would rebail to him the aforesaid 10l. &c. as above. Again, on a bailment of money: And therefore wrongfully, for that whereas the said A. such a day BAILED to the said Abbot, and one Robert a monk there, 10l. to keep till he demanded it of them; by reason of which the said A. at such a day, year, and place, demanded the aforesaid 10l. and they would not pay it, &c. For rent on a lease: And therefore wrongfully, for that whereas the said A. on such a day, &c. LEASED to the aforesaid B. one carve of land in C. for the term of ten years, the term commencing such a day, &c. to pay 10l. per annum during such term; and the payment of the two first years amounting to 20l. is arrear; by reason of which the said A. has frequently come to the aforesaid B. and requested him to pay the aforesaid 20l. which he has never been willing to do, nor yet will, &c. Against a pledge, or collateral security, thus: And therefore wrongfully, for that whereas the said A. sold to one Robert Fox ten quarters of corn for 10l. to be paid on such a day, &c. for which the said B. became his pledge; at which day the said Robert did not pay any thing; for which

reason the said *A.* often came to the said *B.* and requested him that he would pay him the said 10*l.* yet he would not so do, &c. Upon a conditional promise to pay: And therefore wrongfully, for that whereas the aforesaid *B.* granted to make a feoffment to the said *A.* of one carve of land, &c. in *C.* on such a day, &c. and if he did not, that he was bound to the aforesaid *A.* in 10*l.* at which day he did not infeoff him; for which reason he requested him to pay him the aforesaid 10*l.* yet he has not been willing, &c. Upon the stat. West. 2. c. 11. against a keeper of a prison (a): And therefore wrongfully, for that whereas one Robert Fox on such a day, &c. tendered accompt to the said *A.* before *X. Y. Z.* auditors assigned by the said *A.* to hear the accompt of the said Robert, of the time that he was bailiff of the manor of *R.* &c. or thus: receiver of his money arising from ten tunnels of wine of the said *A.* sold by the said Robert, for the profit of the said *A.* at Oxford, and remained 10*l.* in arrear before the aforesaid auditors; by reason of which, by the testimony of the auditors aforesaid, the aforesaid Robert was committed to the prison of *B.* according to the form of the statute of our lord the king in this matter provided; and there such a day, year, and place, &c. and by the aforesaid *B.* then keeper of the prison aforesaid was received, and in the said prison detained from the aforesaid day to such a day, when the aforesaid *B.* without the assent of the said *A.* and without gree being made to the said *A.* let the said Robert go out of the aforesaid prison; by reason of which, according to the form of the aforesaid statute, an action hath accrued to the said *A.* to demand the aforesaid 10*l.* of the aforesaid *B.* and the said *A.* hath often come to the said *B.* and requested him to pay the aforesaid 10*l.* and he was not willing so to do, &c (b). These may

(a) Vid. ant. vol. II. 179.

(b) Novæ Narr. fol. 37. b. to 39. b.

be sufficient specimens of the form in which narrations upon the writ (as they were then called) were conceived.

It next follows, that we should take notice of such decisions as tended to reduce this action nearer towards the form in which it appeared in latter times. We have seen, in the last reign, that a deed made in a place not within the process of the court could not be the subject of an action, as deeds made in Chester, Durham, Ireland, and other places beyond sea (*a*). As to Chester and Durham, the difficulty was probably now removed by stat. 9 Ed. III. st. 1. c. 4. and in other cases they seem to have hit upon an expedient to avoid this objection. But places out of the realm caused the same difficulties as heretofore, and drove lawyers to the necessity of resorting to expedients to remove them. Thus, where an obligation was made at *Harfleet in Normandy*, the plaintiff counted upon it as made at *Harfleet in Kent*; and though it was objected that there was no such place in Kent, the objection seems not to have been attended to. This bond concerned a retainer of men to serve in France in the wars. It was argued, that this being for duties to be performed out of the kingdom in foreign parts, it ought to be tried before the *constable and marshal* (a new jurisdiction, of which nothing was heard till this reign); but it was held that the action would well lie in a court of common law. It was at the same time held, that where a demand was grounded on an obligation, the plaintiff could not go for less than the whole sum, unless satisfaction was confessed for the remainder (*b*).

It was held, that an action of debt would lie for damages recovered in a real action; so that, should the ancestor die before execution, the heir might have execution of the land, and the executor of the damages (*c*). Where money

(*a*) Vid. ant. vol. II. 330.

(*b*) 48 Ed. III. 2.

(*c*) 43 Ed. III. 2.

was given to a man to make a profit of it for the plaintiff (as in one of the declarations above stated), he might, at his option, have either an action of debt, or accompt (*a*). Where a person came to a creditor and engaged to him, that, should his debtor not pay him, *he* would become his principal debtor, and pay him at such a time, it was held that an action of debt would not lie without a specialty, for this was no discharge of the first debtor; though it would have been otherwise if the promise had been by deed (*b*). If a man committed a felony, it was held, he did not forfeit his debts without specialty, though he did those upon specialty; for if the king brought an action for the former, the defendant would be deprived of his law-wager by the prerogative, which the law would not suffer (*c*). Such differences were made between specialties and common debts. Where two were bound severally in an obligation, two several *præcipes* were brought, and they were held good. Where a bond was accompanied with a condition, the defendant might aver the payment *at the day* without a specialty; for though he could, upon a single bond, compel the obligee to give an acquittance, he could not in case of a bond upon condition. But a plea of payment *after* the day, though the acceptance of the obligee was alleged, would not prevent the plaintiff from recovering (*d*).

In debt for rent, if the lessor's estate was determined by the entry of any one upon him, as of the disseisee upon the disseisor, the person who infeoffed upon condition, or the like, all this would be a good plea in bar of the action. If a man holding for years leased his whole term, he could not distrain, because he had no reversion; but he might have an action of debt for the rent (*e*). If a lessor entered,

(*a*) 42 Ed. III. 9. (*b*) 44 Ed. III. 21. (*c*) 49 Ed. III. 5. Vid. ant. vol. II. 21. (*d*) 46 Ed. III. 29. (*e*) 45 Ed. III. 8.

it would be a good plea to discharge the rent accruing since (a). If a man leased for his own life, debt lay for his executors without a specialty: in like manner, if the lease was for the life of the lessee, it lay against the executors of the lessee, without specialty (b). A lease was made to two by indenture, which one sealed, but the other did not; yet the other was held bound to pay the rent by the *occupation*, though he was not bound to the conditions of the lease (c). It was held, an action of debt would lie for rent, notwithstanding a right of re-entry was reserved (d); but if the plaintiff entered, this might be pleaded in bar of the action (e). Where rent was reserved in kind, the writ was brought in the *detinet* only, and not in the *debet*; and though it was urged that this, being a rent, should be demanded as a debt, it was answered, that the chancery would never make a writ in the *debet*, except it was for money; the writ was accordingly adjudged to be good (f).

Where an action was brought against a baron and feme for damages recovered against her *dum sola*, the writ was *debent et detinent*: when it was strongly contended that it should be only in the *detinent*, it was decided to be good. Again, where an action was brought by an abbot or prior on an obligation to his predecessor, it was laid in the *debet et detinet*, though it would be different in the case of executors (g): yet where one executor sold goods of the testator, he might have his writ alone, and as for a debt of his own (h). If a feme died, the baron was discharged from all her debts, and deprived also of all her credits *dum sola* (i). Where money was paid for instructing a child in a certain trade within so many years, and the child died

(a) 45 Ed. III. 4. (b) 44 Ed. III. 42. (c) 38 Ed. III. 8. (d) 38 Ed. III. 22.
 (e) 45 Ed. III. 4. (f) 50 Ed. III. 16. (g) 47 Ed. III. 23. (h) 38 Ed.
 III. 9. (i) 49 Ed. III. 25.

before the time expired, it was held, debt would not lie to recover the money; and if the money had not been paid, the instructor would not have been intitled to an action (*a*). It was held, that where a man promised to give so much money to *I. S.* if he would take his daughter to wife, debt would lie; but if the money had been promised *in marriage*, it would not lie, on account of the word *marriage*, it being then become an object of spiritual cognisance (*b*). If an heir pleaded falsely, he was to be charged in his own land, which he took by purchase, as well as in that he took by descent (*c*).

A defendant pleaded to an obligation, that he had performed the conditions upon which it had been made, that accordingly the plaintiff restored it to him, and afterwards took it with force and arms; this was held a good plea (*d*). Again, in another action depending in the exchequer, the same was allowed as a good plea in debt, though it was not in trespass, where nothing but damages recovered could be a bar (*e*).

It may be proper here to mention the writ *de plegiis acquietandis*, which was a common remedy for a surety against the principal debtor, after having paid the debt for which he was bound. This writ was in use in Glanville's time (*f*); and, though word for word the same, it then lay for the creditor against the surety. The present notion of suretyship was, as has just been observed, that such a collateral engagement to pay, on default of the real debtor, was not good without writing; and therefore the writ *de plegiis acquietandis* could not be maintained against the original debtor without writing (*g*). The writ of *si recognoscat* was still in use (*h*).

(*a*) 21 Ed. III. 12. (*b*) 22 Ass. 70. (*c*) 21 Ed. III. 9. (*d*) 43 Ed. III. 23.
 (*e*) 43 Ed. III. 27. (*f*) Vid. ant. vol. I. 159.
 (*g*) 43 Ed. III. 11. 44 Ed. III. 21. (*h*) Vid. ant. vol. II. 256.

The action of *detinue* still preserved very strongly its original affinity with the former: the wording of this writ was the same as in the reign of Edward I (a). Respecting these two writs, when they were to be in the *debet*, and when in the *detinet*, we find the following rule: In a writ for chattels, it was never to be alleged *quæ ei debet*; nor in a writ of debt, if brought by an executor, or by any other against an executor, whether it was a debt or a chattel, and in whatsoever court the writ was brought; for it was always required to be *injustè detinet*. In

Of *detinue*. other respects, there was a difference between the practice in the common-pleas and before the justices itinerant; for in the former it might be *debet et detinet*, if they were not chattels, nor against or for executors or administrators, for then it should be *detinet* only: in the latter, if for debt it was to be *debet* only, and for chattels *detinet* (b).

Detinet. The following are some specimens of declarations upon a writ in the *detinet*. First, upon a bailment: *Ceo vous monstre, &c. This sheweth you A. that B. wrongfully DETAINS from him chattels to the value of 20l. and therefore wrongfully, for that whereas the said A. on a certain day, year, and place, BAILED to the aforesaid B. linen and woollen cloth, to keep till he demanded it, the said A. on such a day, year, and place, requested the said B. to return the aforesaid chattels, yet he was not willing to return them, nor yet will, &c. For restoring, after a divorce, certain goods given in frank-marriage: Ceo vous monstre, &c. This sheweth you Ellen, who was the daughter of A. who is here, that N. Fox, who is there, wrongfully detains and will not return to her chattels to the value of 10l. and therefore wrongfully, for that whereas the said A. on such a day, year, and place, gave the aforesaid N. chattels to the value of 10l. namely (c), corn and grain, in frank-marriage with the said*

(a) Vid. ant. vol. II. 261.

(b) Q. N. B. 63.

(c) Scilicet.

Ellen, the said N. after espousals solemnly had between them, came and procured one Alice to demand him, as her husband, by precontract made between them; so that at the suit of the said Alice, and by the procurement of the said N. a divorce was had between the aforesaid N. and Ellen on such a day, year, and place, before the ordinary, &c. by reason of which divorce an action hath accrued to her to demand the aforesaid chattels given with her in frank-marriage in the form aforesaid; by reason of which the said Ellen hath often come to the said N. and requested him to return the aforesaid chattels, yet he has never been willing to return them, &c. (a)

Very little need be said on this action, as distinguished from that of debt; they may perhaps be considered as identically the same in all their properties, process, circumstances, and form, with the difference, that one was for the recovery of a chattel, the other of money. Any one who had a right to a chattel, though he had never been in possession thereof, might have this writ to recover it; as where a deed was bailed to *A.* to deliver to *B.* *B.* was intitled to *detinue* (*b*). So an heir might have *detinue* for an *heir loom*, though he never had had possession thereof (*c*). There was another writ of *detinue*, which had been held maintainable without any possession, but which, after some discussion in the former reign (*d*) upon another point, was at last held not to be warranted by law. This was an action by a widow against the executor, for her reasonable part of her husband's goods. These actions, notwithstanding that decision, continued to be brought, and were variously treated by the courts.

The point upon which this question rested, seems to have no other authority in the law books, than a chapter in *Mag-*

(a) O. N. B. 40, b. 41, a.

(b) 39 Ed. III. 17.

(c) 39 Ed. III. 6.

(d) Vid. ant. vol. II. 334.

na Charta (a) and a passage in Glanville (b). That chapter of the Great Charter is not directly upon the subject of distributing the effects of deceased persons; but having ordained a surer method of levying the king's debt, it adds, as a security to the subject, that all the rest shall belong to the dead person, *saving* their reasonable parts to the wife and children: a saving which seems sufficiently necessary, if it were only on account of the particular customs in some counties and other places, which required a man always to leave something to his wife and children, and which would otherwise have been abrogated by the general scope of the former provision. It does not, therefore, seem a necessary conclusion from thence, that such a distribution of the effects was the general law of the kingdom. As to the passage in Glanville, there seems in it an ambiguity, if not a contradiction. That author might be quoted as well in favour of as against the proposition, *that it was the general law of the kingdom for a man's wife and children to be intitled to a proportion of his effects, notwithstanding a will*. Upon these authorities, together with the determinations mentioned in the last reign, stood this question, when it underwent the following discussion.

In the third year of the king we find an action of detinue brought by a husband and wife against the executors of the wife's father, for her child's portion: it was laid upon *the custom of the county of Northampton*, and she alleged she was not advanced by her father. The cause went off upon the issue, whether married and advanced by her father, without any question arising about the point of law (c). In 17 Ed. III. such a writ of detinue was brought by a baron and feme, for her *reasonable part* of her former husband's goods, against his executors; which writ made mention of the custom of the realm (d); but this went off

(a) Vid. ant. vol. I. 244.
de Rati. Parte 8. 3 Ed. III.

(b) Vid. ant. vol. I. 111, 112.
(d) 17 Ed. III. 9.

(c) Bro.

upon another point. In the 30th year there was another writ of detinue, stating, *Cum, per consuetudinem totius regni Angliæ hactenus usitatam et approbatam, uxores debent et solent a tempore, &c. habere suam rationabilem partem bonorum maritorum suorum, ita videlicet, quod si nullos habuerint liberos, tunc medietatem, et si habuerint, tunc tertiam partem, &c.* It was objected to this writ, that it made mention of common usage through the whole realm, which could mean nothing but the common law; and if it was the common law, he might have a simple writ of detinue: for if a man brought a writ of ael, or assise of mortauncestor, reciting that heirs ought by the common custom of the realm to inherit to their ancestors who died seised, the writ should abate. The same here; for should a traverse be taken to this part, it could not be tried by an inquest, because the issue would be what was the common law of the land; which could not be tried by a *pais* of a particular county, but could only be tried by the court. They admitted that a man might have a writ of the custom of a particular place, for it might be tried by the country. With respect to the present writ it was added, that such a one had been abated before Sir *Wm. Herle*; meaning, no doubt, that before mentioned in the 17th year of Edward II. (a) It was argued, that in that case the writ was abated, because it purported to be founded on the Great Charter.

In like manner, should a woman bring a writ of dower, and demand a moiety, if the custom was comprised in the writ, it would be bad; and therefore she should make her demand in the writ generally, and upon that should shew special matter to maintain her demand: so it might be here, and the plaintiff might count according to his case. Then *Stamford*, one of the clerks, shewed a writ that was brought by an infant not advanced, contain-

(a) Vid. ant. vol. II. 334.

ing all the matter of this writ, which, he said, was held maintainable. Here the debate upon the form of the writ rested ; and when the executors began to resort to other points, namely, that they were to account before the ordinary, and that this question of distribution belonged rather to the spiritual than the temporal court, they were told they were not to plead to the jurisdiction, after they had objected to the writ ; so that, upon the whole, it should seem as if the writ was there approved of (*a*).

The next action that appears in the books was grounded upon the custom of the county of Sussex, which was stated as allowing a reasonable part of the *intestate* father's goods to go to the son ; but this being upon an intestacy, led to no debate upon the before-mentioned point ; though it was said, this custom precluded the father from making a will in prejudice of his wife and children (*b*). On that occasion, it was said, that this writ, in case of intestacy, had always been admitted by the ordinary. The next is in the 40th year of the king. This is grounded upon the custom of a will, by which the children were to have a reasonable part of their father's goods ; but it does not appear whether it was brought against executors, or upon an intestacy : however, the defendant set up an advancement, as a plea in bar ; to which the plaintiffs replied, the gift mentioned was only a reversion, and therefore no lawful advancement to bar their reasonable portion. The defendant said it was, and demanded judgment, which drew from the bench the following observations. *Thorpe*, one of the justices, said, *How can we give judgment, when you have accepted an action which is contrary to the law, and have pleaded matter in affirmance of it?* and *Mowbray*, another justice, said, *The lords in parliament would never grant that this action should be maintainable by any common custom, or law of this realm.* But as the plaintiff had not pleaded

(*a*) 30 Ed. III. 25, 26.

(*b*) 39 Ed. III. 9, 10.

to the writ, the justices took time to advise what should be done (a). The writ in question being grounded on a *particular* custom, and it not appearing whether it was brought in the case of a will, or of an intestacy, we are left quite at a loss for the grounds on which the judges pronounced the above-mentioned opinion; for though there might be arguments against such a *general* custom, or against alleging it in the writ, it is difficult to say that such a particular custom might not be good; though *Thorpe* doubted of it in the former case from Sussex, saying, it was hard to restrain a man from making a will of his own effects.

Thus, the law stood at the latter end of this reign, as it did at the close of the former; and conformably with this opinion against the writ, it is not inserted in the old *Natura Brevium*, which has only the writ of right *de rationabili parte*. It is remarkable, that this writ of right is omitted in Fitzherbert, and the writ of detinue now in question adopted, under the denomination of *de rationabili parte bonorum*. There is in the *Novæ Narrationes*, a book certainly long prior to the above determination, a declaration in detinue by a widow against an executor for a moiety; and it is added in a note, that the same would lie *pro hærede de tertiâ parte*, if the wife was alive; and if dead, for a moiety (b). What deference was paid to the last decision will be seen in the sequel. It seems strange, that a question of so extensive importance, and so frequent recurrence, as the disposition of a deceased person's effects, whether by will or administration, should remain a doubtful case at this time. Perhaps the jurisdiction that the spiritual court had exercised over testamentary matters, tended to keep this point of law in obscurity, and undecided. After all, it is difficult at this time to account for so singular a difference of opinion.

(a)

(a) 40 Ed. III, 38. b.

(b) Nov. Narr. 40.

To return to the common writ of *detinue*. In a declaration upon a bailment of sheep, the defendant pleaded, that they were bailed to him to feed his ground, and that he gave notice to the plaintiff to take them back, which he neglected; so that the defendant distrained them damage feasant: this was held a good plea in discharge of the bailment, without any other possession in the plaintiff afterwards; and therefore he was put to traverse the notice (*a*). If a bailment was made to a baron and feme, *detinue* was held to lie against the baron alone, and the writ would abate if brought against them both; but if a chattel came to a woman's custody as executrix, and she took a husband, the action might be against the husband and wife jointly (*b*). It was once held, that should a chattel come to the hands of one executor, *detinue* would lie against him alone, upon the idea that he was charged upon the possession only, and not upon the bailment (*c*); but this was afterwards over-ruled, upon a plea that there were other executors (*d*).

It was observed in the former reign (*e*), that the writ of *detinue* was frequently brought to recover charters that had been deposited for assuring land, and other purposes: this was a very common action, but was considered as of a particular nature, and differing from the common action of *detinue*. Thus, after the statute of this king which gave process of outlawry in debt, and *detinue* of chattels, it was held that *charters*, as they appertained to the freehold, should in an action for them be privileged as the freehold was, concerning which no process of outlawry lay. A *detinue of charters* therefore was not a *detinue of chattels*, and the process was only summons, attachment, and distress (*f*). The writ *de chartis reddendis* did not however, in other respects, differ from the common action of *detinue*,

(*a*) 43 Ed. III. 21.
Ed. III. 30.

(*b*) O. N. B. 64.

(*e*) Vid. ant. vol. II. 333.

(*c*) 39 Ed. III. 5.

(*d*) 41

(*f*) Vid. ant. vol. II. 438, 439.

except in the description of the subject. It was, *Præcipe, &c. quodd reddat quandam cistam cum chartis scriptis et aliis munimentis, ac diversis chartis et bonis in eadem cistâ contentis serurâ ipsius B. clausam, quam, &c.*; or, *quandam chartam, or duas chartas, or quoddam scriptum obligatorium, or quoddam scriptum conventionale, &c.* and so on, as in the common writ (a). A declaration upon a writ *de chartis reddendis* might be thus, &c.: *Two charters, two writings obligatory, and one quit-claim, which he wrongfully detains; and therefore wrongfully, for that the said A. such a day, year, &c. bailed to the said N. two charters, that is to say, one charter by which one Robert Map infeoffed him of a mese in C. one charter by which one John P. infeoffed one Jordan at C. of the manor of L.; and two writings obligatory, that is to say, one writing by which one G. H. was bound to the said A. in 100 shillings, and another by which one W. R. was bound to the said A. in 20 shillings; and one quit-claim, in which it was contained, that one S. T. to him released and quit-claimed all the right which he had in the manor of W. to keep till he demanded them; by reason of which the said A. often came to the said N. and requested him to return him the aforesaid charters and writings, yet he was not willing so to do, &c.* A TORT ET A DAMAGES, &c. (b)

why is this
altered a
mese is a
mese. R.P.

There arose much debate whether a writ was to be considered as a common writ of detinue, or of the latter kind; and the distinction depended on the action being generally for a box of charters, or specially for certain charters by name and description. It was laid down as a rule, that if the plaintiff did not count of a box that was closed, or sealed, he should count of the charters specially, for in such case he might easily inform himself of them (c). In detinue for a bag of charters it was held, that if the defendant was returned *nihil*, the plaintiff might have a ca-

(a) O. N. B. 65.

(b) Nov. Narr. 41.

(c) 39 Ed. III. 7, 8.

pias, because the *bag* was only a *chattel* (a): but if the writ was for charters in special, *capias* would not lie (b). Sometimes, when the writ was general for *a box and charters*, the count should be special, naming the charters; which way of declaring was not at first looked upon as consistent (c), but was at length allowed (d). The advantage gained by this new way was, that the tenant was thereby excluded of his law-wager, to which he was intitled upon a general declaration in detinue. Some difficulty was raised in these actions by the property of the box and that of the charters being in different persons; the former belonging, as a chattel, to the executor; the latter, as a muniment of his estate, to the heir. Yet charters did not of course go with the title to the land. It did not follow that the feoffee upon his feoffment became intitled to the charters of the estate; for it might be necessary for the feoffor to keep them, to enable him to make his claims of warranty and the like against his lord paramount (e). It was laid down, that where charters were burnt, the plaintiff should recover damages to the value of the land to which they related, if the action was *de chartis reddendis*; but if in trespass, he was to have only damages for the taking against the peace; in the former case, therefore, it was proper to allege the value of the land in the declaration (f).

The writ of *annuity* was nearly allied to the writ of debt, being a demand for arrears of annuity which were detained. This writ agrees with that in the time of Edward I. (g) The following is a specimen of a declaration: *Ceo vous monstre, &c. N. wrongfully detains, and will not render to him four marks of silver, which are in arrear of an annual rent which he owes him; and therefore wrongfully, for that whereas the said N. on such a day, year, and place, obligated himself by this deed here present, to the aforesaid*

(a) 40 Ed. III. 25. (b) 42 Ed. III. 13. (c) 41 Ed. III. 2. (d) 44 Ed. III. 41. (e) 44 Ed. III. 1. (f) 17 Ed. III. 45. 21 Ed. III. 20. (g) Vid. ant. vol. II. 258.

E. in two marks to be paid to the aforesaid E. on the day of Easter from year to year, during all the life of the said E. of which the said E. was seised by the hands of the said N. till two years before the writ purchased, which he has withdrawn to his damage, &c. (a) The process in this writ was summons, attachment, and distress. It was held, this writ would not lie for executors, who, in lieu of this action *de annuo redditu*, were to have a writ of debt in the *detinet* (b). If the annuitant assigned his annuity, the assignee could not recover arrears by the writ of annuity, for that would be granting a right of action which the law did not allow (c). It was held, that an heir should not be charged with an annuity by prescription, by the mere payment of his ancestor (d). And whether an annuity was demanded on a prescription or grant by deed, the plea of *rien arrere* could not be supported without an acquittance (e). If an annuity was granted to a physician, or a lawyer (as was very common), *pro concilio impenso, et impendendo*, or *pro auxilio, et concilio habendo*, it became discharged on a refusal in the former to attend the grantor, or in the latter to give advice; for it was said, a lawyer was not to be expected to come to his client. If such a grant was with the general reservation *pro concilio habendo*, and the like, it would be interpreted to mean that which the grantee was best qualified by his profession to give (f). Annuities were frequently charged upon land, which gave the grantee a power of distress, and, if interrupted in such distraining, an assise of novel disseisin.

There were two ways of proceeding with a person who was liable to *accompt*. One was, for the party to bring him to account before himself, or before auditors assigned by himself; the other was, by an original

(a) Nov. Narr. 37. (b) O. N. B. 75. (c) 41 Ed. III. 27. (d) 49 Ed. III. 5. (e) 44 Ed. III. 18. (f) 22 Ed. III. 7. 41 Ed. III. 6. 19.

writ of *account* summoning him into court to make his account there. If a person took himself the account of his receiver or bailiff, who was found in arrears, he had no further remedy but an action of debt for these arrears: if the account was passed before auditors assigned, he might have his action of debt for the arrears, or proceed in a more summary way, by imprisonment under the stat. Westm. 2. c. 11 (a); and the accountant, if falsely charged, might have his writ of *ex parte talis* to re-examine the account in the exchequer, as directed by that act (b).

If the plaintiff chose neither of these courses, or the party could not be brought to account, he might resort to the writ of account. The writ was thus: *Præcipe, &c. quodd justè, &c. reddat B. rationabile compotum suum de tempore quo fuit ballivus suus in C. or, receptor denariorum ipsius B. &c.* (c) The following are specimens of declarations in account: *Ceo vous monstre, &c. A. that N. &c. wrongfully will not render him a reasonable accompt of the time that he was his bailiff in C.; and therefore wrongfully, for that whereas he was his bailiff of the manor of C. which was worth 100l. per annum, having the administration of its stock, namely, oxen, cows, hogs, and sheep, and other chattels, from such a day and year to such a day and year, by reason of which the aforesaid A. often came to the aforesaid N. and requested him to render him an account of the issues arising from the said manor, which he refused, and still does, A TORT ET A DAMAGES of 100l. As receiver, &c. Adam Pye, &c. that R. Fox, merchant, wrongfully will not render his reasonable account of the time he was receiver of the monies of the said Adam; and therefore wrongfully, for that whereas the said R. on such a day, &c. received of the said Adam 10l. to merchandise and improve for the use of the said Adam, he has merchandised with the said 10l. and received the profits*

(a) Vid. ant. vol. II. 173.

(b) O. N. B. 60.

(c) O. N. B. 57. B.

from the aforesaid day till such a day, without rendering any account thereof (a); by reason of which the said Adam has frequently come to the said R. and prayed him to render an account of the same, &c. Again, And therefore wrongfully, for that whereas the aforesaid N. was the bailiff of the said A. from such day continually for a whole year to such a day, of the goods and chattels of the said A. namely, of corn, grain, &c. to the value of ten marks, by reason of which the said A. often, &c. (b)

This action was the common remedy in mercantile transactions, and in almost all cases where there were dealings and an unliquidated demand. The common way of charging the defendant, was either as *bailee* or *rescivor*; and some significant reasons were given why he should be charged in one or the other character. Where silver wares were bailed by the plaintiff to the defendant, to be sold, and he sold them, and received the money for them, it was said he should be charged as *bailee*, and not as *receivor*: the same where one employed a person to sell his wines (c). Again, where herrings were intrusted to a man to sell, it was held the action should be against him as *bailee*, not as *receivor*; and the reason given was, that a *receivor* was allowed no costs, but a *bailee* was: therefore the defendant, who might have been obliged to go from one place to another to sell these articles, suffered an injustice, if he was declared against as a *receivor* of money where he would not be allowed his expences (d). But this action would lie against others than *receivors* and *bailees*. Where a lord had entered into lands as guardian in chivalry, and it was meant to try whether they were not *socage*, an action of account was brought against him *as occupier* for the profits he had received (e); though perhaps, in this case, the pro-

(a) SANS CEO QUE.
Ed. III, 9.

(b) Nov. Narr.

(c) 46 Ed. III, 3.

(d) 46

(e) 49 Ed. III, 10.

per idea was that of a *receptor*, which was an universal character that suited every one who had received money or profit to the use of another, for which he ought to account. Upon this principle it was that the following actions were supported. Two being possessed of an ox in common, and one having sold it, the other might have account against him: so where trees were cut by one who held *pro indiviso* with another (a). If tenant by *elegit* committed waste, the remedy was a writ of accompt, and not waste (b). Money was bailed to have a security of land given for it; if not, to be rebailed; upon no security being given, an action of accompt lay (c). One joint lessee for years might have accompt against another, if he took the issues and profits to his own use; for he would otherwise be without remedy, as he could not have an assise. But one executor could not have account against the other, because they took nothing to their own use, and they were bound to account before the ordinary. If two guardians were in common, and one took the intire profits to his own use, accompt lay, and the count was to be against him as receptor to their common use: so of coparceners; but not so of tenants in common, for they might have an assise (d). If a defendant was counted against as receptor, the plaintiff must allege by whose hands he received; but if he could not put this in certain, he might charge him as bailee, and then it would not be necessary (e).

In this action there were two judgments: the first was *quòd computet*, upon which auditors were assigned; and after the account made, then came the final judgment for the arrears. As the writ was grounded upon a complaint that he refused to account, it was reasonable that *plenè computavit* should be a good plea to the action, and an account

(a) 42 Ed. III. 22. (b) Bro. Accompt 36. (c) 41 Ed. III. 7. (d) 39 Ed. III. 27. (e) 43 Ed. III. 21.

before the plaintiff would be sufficient (a). He might plead *ne unque receiver*, or *ne unque receiver per main I. N.* the person through whose hands the declaration alleged him to have received monies; that he was not bailiff to the plaintiff of such a manor, but lessee. He might plead a release of all receipts; he might plead nonage (b); and if any of the above pleas were found against him, there would be a judgment *quòd computet*. He might plead *prist d'accompter*; and then there was of course the same judgment, and auditors would be assigned. Before the auditors he would be allowed to allege such matters as would go in discharge of himself. He might plead payment to the plaintiff without shewing an acquittance (c). Upon the judgment to account, there lay the process of *capias* and outlawry against the defendant, according to the statute of Westm. 2. (d) It was held, that the first judgment was not such as could be revived by *scire facias* upon the death of the plaintiff before the account taken; nor could a writ of error be brought thereon; yet the plaintiff could not be nonsuited after it (e). It was on the final judgment only that execution could be had. It was held, that where there were two defendants, and one was sued to outlawry and then taken, and the other not, the proceeding might be against him alone that was taken (f).

An action of *covenant* was the common remedy where an indenture of agreement was sealed and properly executed by two parties, and one of them did not perform his part. This writ was always founded upon such a specialty; and the process was summons, attachment, and distress. The following is a specimen of a declaration upon a writ of covenant: *A tort, &c. wrongfully keeps not the covenant made between them, to maintain honourably the aforesaid*

(a) 41 Ed. III. 3. 9. 45 Ed. III. 14. (b) 49 Ed. III. 10. 21 Ed. III. 8.
24 Ed. III. 32. 67. 10 Ed. III. 7. (c) 41 Ed. III. 25. (d) Vid. ant.
vol. II. 178. (e) 21 Ed. III. 9. 32. 42 Ass. 11. (f) 41 Ed. III. 9.

Edward in living and clothing, as long as the one and the other lived; and therefore wrongfully, for that whereas on such a day, year, and place, a covenant was made between the aforesaid Matthew and Edward, by which the aforesaid Matthew granted by his deed here shewn, to maintain honourably the said Edward in living and clothing as long as the one and the other lived; yet the said Matthew the aforesaid Edward according to the form of the aforesaid covenant maintains not; by reason of which he has often come to him, and prayed him to keep this covenant according to the form of the writing aforesaid, but he would not, nor yet will, A TORT, &c. (a)

A writ of covenant was that upon which fines were most commonly levied. In such case, the declaration was, *A TORT, and wrongfully keeps not his FINE made in the court of, &c. &c.* unless the covenant to convey had been made out of court, and then it was termed a mere covenant. Indeed, in most cases, there was not actually a previous fine or covenant, but the writ of covenant was brought upon such *supposed* transaction; and, being an amicable proceeding, it passed of course without enquiry, and was afterwards maintained for the assurance of estates, and the quiet of property. These were called covenants *real*; the writ of covenant in this instance having the effect of actually transferring the land, and so producing a *specific* effect. Other writs of covenant were said to be *personal*, because damages only were recovered for the breach of them. There was one instance in which a doubt seems to have arisen, whether this writ was real or personal. We have seen, that a writ of covenant (b) was the remedy which a termor for years had against his lessor when ejected, and that the *quare ejecit infra terminum* was contrived in aid of this writ. However, it was still held, that where a lessor

(a) Novæ Narr. 44. b.

(b) Vid. ant. vol. I. 341.

ousted his lessee, the latter might in covenant recover both his term and damages; and if the term was expired, he would recover the whole in damages (*a*). In the 38th year, when it was said that a term should be recovered in covenant, it was denied by *Thorpe* and *Skip*, who said the plaintiff should recover only damages (*b*); though by a case in the 47th year it should seem, the general opinion was, that in covenant by the lessee against the lessor, he should recover his term (*c*).

Another point of debate in covenant was, whether the obligation and benefit of such agreements descended on the representatives of the covenantors and covenantees respectively. It was clearly held, that an executor was not bound to perform a covenant, if the covenantor had not bound his executor expressly; for covenants only bind those who make them, and not their heirs or executors, unless named (*d*). But where land was let to one *habendum* to him and his assigns for years, it was said that the assigns might have an action of covenant against the lessor, even though they were not named in the deed (*e*). And where one brought an action of covenant as heir against an abbot for not performing service in the manor-chapel, and it was objected he had an elder brother, and so was not heir; it was agreed by the court, that if he was *terre-tenant* it was sufficient, and he might have the action without the privity of heir, because it was a covenant that went along with the land. Again, where, upon a partition between parceners, one covenanted to discharge the other from all suits, it was held, an alienee should have covenant if he was not discharged (*f*). And this seems to have been the principle upon which representatives might claim the benefit of, or be liable to, covenants, namely, if such cove-

(a) 26 Ed. III. Fitz. Cov. 3.

(b) 38 Ed. III. 24.

(c) 47 Ed. III. 24.

(d) 48 Ed. III. 1.

(e) Bro. Cov. 45.

(f) 42 Ed. III. 3.

nants were attached to, and dependent upon, the land which they enjoyed.

The action of *replevin* might be prosecuted either before the sheriff, or *in banco*. If in the latter, this action might be in two ways; either by original writ at common law, or by *pone*, according to stat 1. Westm. 2. c. 2 (a). The following is a specimen of a declaration *in banco*: *Ceo vous monstre, &c. that D. &c. wrongfully took the cattle, &c. namely, &c. such a day, year, and place, and chased them to his house, and there impounded them, and them so impounded detained from such a day to such a day then next ensuing, when deliverance was made by John, &c. a bailiff of our lord the king, sworn and known, &c. à tort et à damages, &c* (b). The process in this action was summons, attachment, and distress. If the sheriff could not find the cattle to make *replevin*, we have seen that, in Bracton's time, he was to take some of the defendant's cattle; and if the defendant had no land or chattels, then he was to be personally attached. The same course still obtained, only some new terms had been adopted: the cattle so removed were said to be *eloigned*; and upon the sheriff returning the *averia elongata*, there issued a process to take the defendants, called *capias in withernam*; and if that failed, there went a *capias* against the person (c). With these immaterial alterations in expression, the proceeding in *replevin* stood upon the foot of the practice in Bracton's time, and the statutes of Edward I. The requisites to this action are said to be six; 1st, very tenant; 2d, very lord; 3d, services; 4th, arrear at the day of taking; 5th, seisin of the service; 6th, within his fee (d). As the defendant in his avowry was to set forth his title to make the distress, the obliging him to allege *seisin* kept the inquiry within bounds, and prevented a debate upon the *right*, which was not to be decided

(a) Vid. ant. vol. II. 47. 176, &c.

(b) Novæ Narr. 62. b.

(c) 43 Ed. III. 26.

(d) O. N. B. 41. b.

by any trial but the duel or great assise, neither of which could be had in this action. The seisin had been limited by the stat. Westm. 2. (a) to the time allowed for bringing an assise. Thus every question of title that might be agitated in a writ of novel disseisin, might be brought forward by a writ of replevin, but with a different effect; as the former only gave the seisin of the distress, the latter the seisin of the land. However, it naturally followed, that many titles to real property were tried in replevin. The process upon the writ of *recaption* was the same as that upon the *pone* and replevin. There was a writ *de catallis nomine districtionis captis reddendis*, which could only be maintained within a borough, where it was the custom to take the doors, windows, or grates, in the way of distress (b).

Before we take our leave of this action we should notice a replevin of a particular sort, the writ *de homine replegiando*. This lay where a man was imprisoned, but was by law replevisable; a writ therefore for his being replevied issued to the sheriff to the following effect: *Præcipimus tibi, quod justè et sine dilatione replegiari facias A. quem B. cepit, et captum tenuit* (or, *quem B. cepit, et tu captum tenes*, as the case might be) *nisi captus sit per speciale præceptum nostrum, vel capitalis justitiarum nostri, vel pro morte hominis, vel pro aliquo alio facto, quare secundum consilium regni nostri Angliæ non sit replegiabilis, &c.* This writ was a justicies, and not returnable. If the sheriff did not obey this writ, there issued a *sicut alias*, or *causam nobis significes*, and then a *pluries*; and if the sheriff still disobeyed, then an attachment followed against the sheriff, directed to the coroners, who were also to see the first writ executed (c).

(a) Vid. ant. vol. II. 176, 177. (b) O. N. B. 73. (c) Vid. stat. Westm. 1. ch. 15. Vid. ant. vol. II. 132. O. N. B. 40.

The action of *trespass* became in this reign still more general than in the former; and though simple in its first origin, it was by construction and legal intendment rendered applicable to an infinitude of cases where an injury was done either to the person or property. The manner of declaring upon this writ was rather general, without stating much particularity of circumstances. The following are some examples of declarations, &c. *Wrongfully came, such a day, &c. and vi et armis, namely, &c. the aforesaid N. took and imprisoned, and in prison him detained from such a day to such a day, on which he was delivered by the king's writ; and other harms, &c. namely, &c. A TORT, and against the peace of our lord the king, &c.* For various trespasses: *Ceo vous monstre, A. &c. that C. &c. such a day, year, and place, came with force and arms, namely, &c. in the park of the aforesaid A. at J. in the said county, and there entered, and therein being without his licence and will, six deer chased and took, and his trees there growing, namely, &c. of the value of 10 marks, cut; and in his several fishery fished, and his fish, namely, &c. of the value, &c. took and carried away, and other injuries to him did, à tort et à damages, &c. and against the king's peace (a).*

When this writ was brought for a trespass on land, it led to a justification upon a title, like the avowry in replevin; but this happened very rarely, it not being so usual to bring on questions upon titles in this as in the writ of replevin. When a title was set out in this action by the defendant, it was not necessary for the plaintiff to do the same, but merely to deny or traverse the defendant's supposed title; the plaintiff, as he was in possession, was presumed to have a right to that possession, and therefore the law would not put him to state it specially (b). Thus where right of common was pleaded, the plaintiff only replied, *de*

(a) Nov. Narr. 74. b. 66. b.

(b) 40 Ed. III. 5.

son tort demesne, sans ceo qui il ad common, prist, &c (a). Where a defendant justified as taking possession under the escheator, the reply was, *a votre oeps demesne sans tiel cause* (b). The same idea prevailed in other writs of trespass that did not relate to land; and the defendant, as a wrong-doer, was expected to make out a justification when called upon by the plaintiff who had sustained the injury.

The principal and most common actions of trespass now in use were three; namely, those for an injury to the person, as for battery or assault; those for taking goods, that is, a *cepit & asportavit*; and those for entering land or a house, or, as it has been since called, a *clausum fregit*. In order to understand the notions now entertained concerning these actions, we shall consider some cases applicable to each of these heads, beginning first with *battery*.

Actions for a battery were usually laid with an assault also; *insultum fecit, et ipsum verberavit, vulneravit, et male tractavit, &c*. In the 22d year, a jury found that the defendant struck at the plaintiff with a hatchet, but did not hit him; and they prayed the discretion of the court as to the law upon the point, when the damages were ordered to be taxed for the assault only, and the judgment against the defendant was, *capiatur* (c). Again, where a defendant was found guilty of the assault, but not guilty of the battery, the plaintiff recovered damages for the former, and was amerced for the latter (d). Thus an assault began to be considered as a distinct and independent cause of action. The day on which the battery and assault were laid, began to be considered as of no consequence; for where a battery was found to be on the day; and on a day after, and even where they found it on another day, it was held sufficient to support the declaration (e). It was esteemed a good justification in

(a) 22 Ass. 42.

(b) 22 Ass. 57.

(c) 22 Ass. 60.

(d) 40 Ed. III. 40.

(e) 39 Ed. III. 1. 45 Ed. III. 24.

assault and battery, to say, that the plaintiff was in a rage, and the defendant only restrained him from doing mischief (a). If a person had recovered damages in an appeal of mayhem, this was looked upon as a recompence only for the wounding, and he might afterwards have an action for the battery (b). However, in an action of battery, the plaintiff might give in evidence a mayhem (c); as he was not to be deprived of redress for the mayhem, though he chose to resort to an inferior remedy. If a wife was beat, an action of battery lay for the husband and wife; and though the husband only would have the damages recovered, yet, being originally a redress to which the wife was intitled, it might be laid *ad damnum ipsorum* (d). An action of battery would lie for the master against any one who beat his servant (e). An action *vi et armis* would lie also for the taking away of his servant (f), and *à fortiori* for taking away his villain: but if any one married a female villain, and afterwards took her away, the lord had no remedy *vi et armis* against the husband (g). A man might have trespass for taking away his eldest son (h). These were properly trespasses on a *cepit et asportavit*; as was that *de uxore abductâ cum bonis viri*; in which it was held to be no plea to say, that the plaintiff was divorced from his wife; for the action was for damages, which should equally be recovered, if they were married at the time (i). However, it was agreed, that where two were married before years of consent, the husband could not have this action till he had arrived at such age, and they had assented or dissented from the marriage (k).

When trespass was brought for goods, it sometimes became a question, what should be construed a *taking*, and

(a) 22 Ass. 57. (b) 22 Ass. 82. 43 Ass. 39. (c) 39 Ed. III. 20.
 (d) 46 Ed. III. 3. (e) 39 Ed. III. 1. (f) 39 Ed. III. 37. (g) 46
 Ed. III. 6. (h) 29 Ass. 35. (i) 23 Ed. III. 23. Vid. ant. vol. II. 211.
 (k) Bro. fresp. 420.

what a taking *vi et armis*. A defendant pleaded, that the goods were thrown into the sea in a storm, and he took them, and when he came to land he gave them the plaintiff's servant, to his use; and this was held a bar of the taking and trespass (a). One tenant in common might have trespass against another of things severed from the land, as corn, hay, and the like; but not of things fixed to the freehold, for then they might have waste *pro indiviso* (b). Yet where goods were left to an executor and another to distribute, it was held, that trespass would not lie for the one against the other (c). Again, though an heir might have detinue of charters against an executor, he could not have trespass (d). The *primâ facie* right was held to privilege such persons from the imputation of trespassors. Where a person acting under authority of law any ways abused that authority, he became a trespassor. As in trespass for taking and killing the plaintiff's horse *contra pacem*; the defendant justified as taking it *damage feasant*, and impounding; and because it had leaped several times over the pound, he tied it, and so the horse strangled itself; which plea was held ill upon demurrer (e).

When the writ was for breaking a house, or entering land, the plaintiff was not to allege a *continuance* of the trespass, because it was a single act: but where it was for depasturing grass, and the like, it might be laid with a *continuando* (f). There was long time a doubt how far this action would lie for a lessee against his lessor, and the contrary. This being for a trespass *vi et armis*, was thought not to lie against the lessor, though he had been guilty of violating his lessee's possession, in direct opposition to his own lease. This was upon the idea of the lessor's freehold (g),

(a) 46 Ed. III. 15. (b) 21 Ed. III. 9. 29. (c) 27 Ass. 64. (d) 42 Ed. III. 24. (e) 27 Ass. 64. (f) 46 Ass. 9. (g) Vid. ant. vol. II. 340, &c.

and the right he had of entering upon any part of it; while the lessee was construed to have a precarious possession, that made him little more than bailiff to his lessor. But the opinion of a farmer's interest was now altered, and the plea of freehold had long been disregarded; therefore, where a lessor distrained, or did any other act upon the land which in the case of a common person would be trespass, the lessee for years might have trespass *vi et armis* (a). On the other hand, where in a lease to one for life there was a reservation of certain trees; which trees the tenant cut; there it was held, that trespass *vi et armis* would lie by the lessor against the lessee for cutting the trees (b). Trespass was a remedy grounded upon the actual possession of the plaintiff; therefore it was a rule, wherever a person was any way put out of possession, he could not maintain trespass till he had made a re-entry (c).

Respecting trespass in general; it had long been held, that there were no accessaries in trespass, but all were principals; and therefore, that a person, by assenting afterwards to a trespass committed, was liable to an action (d). A writ of trespass, as it was for a wrong done, was to be brought against the wrong-doers individually, and therefore it would not lie against a corporation, against which no *capias* could issue (e); and it was agreed, that more trespasses than one might be joined in one writ. It was a common plea in trespass for hunting, to say, that the defendant had licence (f). In all actions of trespass, any matter stated as a recompence to the plaintiff might be pleaded in discharge; as, recovery in another action; amercement in an inferior court (g); that he had *agreed* with the plaintiff for the trespass (h); or, even such as was only in a course of

(a) 48 Ed. III. 5, 6, 7. Vid. ant. 29. (b) 46 Ed. III. 22. (c) 44 Ed. III. 18. (d) 38 Ed. III. 18. 30 Ass. 6. (e) 22 Ass. 67. (f) 42 Ed. III. 1, 2. (g) 47 Ed. III. 19. (h) 22 Ass. 51.

giving the plaintiff satisfaction, namely, that an action of replevin was depending for the same taking (*a*). An officer might justify in trespass under the process of a court, however erroneous; but not so, if the cause of action arose without the limits of the court's jurisdiction (*b*).

But not content with the writ of trespass in its old form, they endeavoured to make it more universal, by enlarging its scope, and modifying its terms, so as to adapt it to every man's *own case*; in doing which they availed themselves of the statute of Westm. 2. authorising writs to be framed *in consimili casu* (*c*). This novelty did not shew itself till towards the middle of this reign; and when it appeared in court, it underwent a discussion and debate that indicated great doubt about the propriety and nature of the innovation.

The first case of this sort, to be found in the Reports, is in the 22d year; when an action was brought against a man, for that he had undertaken to carry the plaintiff's horse in his boat over the Humber, safe and well; but that he overloaded his boat with other horses, by which overloading the plaintiff's horse perished, *à tort et à damages*, &c. It was objected to this writ, that it supposed no *tort* in the defendant, but on the other hand proved the plaintiff should rather have a writ of covenant. But it was said by one of the judges, that the defendant committed, as it should seem, a trespass in overloading the boat, by which his horse perished, and that the action would lie (*d*). Thus the notion of a trespass, or a *malfeasance*, was the principle upon which the application of this new remedy was explained, and justified, even in this instance, which seems to approach nearer to the nature of a contract.

It was taking the idea of trespass in a very large sense, to consider this and some writs which follow to be at all

(*a*) 38 Ed. III. 35.

(*b*) 22 Ass. 64.

(*c*) Vid. ant. vol. II. 202.

(*d*) 22 Ass. 41.

allied to it. From this time to the 42d year, we find mention of several actions, and *dicta* concerning remedies, which could be no other than actions formed upon the special *case* of the party, without including any trespass, except of the vague kind above supposed. It was said, that should a contract be made between two men, that one should give the other 10*l.* in case he would marry his daughter, an action would lie for the money (*a*). This action could not be such an one as we have hitherto in the course of this History met with; for covenant, which seems the only writ applicable to such a case, would not lie but upon a deed: it must therefore have been a special writ upon the case. We find several of the same kind: an action against a sheriff for quashing the plaintiff's essoin in a plea of replevin before him, without the assent of the suitors (*b*): an action against a sheriff for a false return of summons (*c*); for directing a wrong officer to summon a pannel, which was therefore quashed (*d*): an action of slander for calling the plaintiff traitor, felon, and robber (*e*); an action against a man because he took certain cattle from another, and offered them to sale to the plaintiff as his own, who, confiding in his word, bought them, and they were afterwards taken from him by the true owner (*f*): all these were actions of a new form; those against the sheriff being writs of *deceit upon the case* (mentioned under that name in the old *Natura Brevium*) introduced in the room of the writ of deceit which has been mentioned before, and were merely for the purpose of recovering damages against the sheriff. Two of them were such for which the old law provided no remedy, matters of scandal being wholly of spiritual cognizance; and the last being within the scope of none of the common-law writs which we have met with in former reigns.

(*a*) 22 Ass. 70.(*b*) 26 Ass. 45.(*c*) 26 Ass. 43.(*d*) 38 Ass. 13.(*e*) 30 Ass. 29.(*f*) 42 Ass. 8.

The same may be said of the following: *Trespas* (says the Report) was brought against an inn-keeper and his servant; upon which the plaintiff counted, that whereas it was a custom and usage through all the realm of England, that in all common inns the inn-keeper and his servants should take good care of what things their guests had in their chamber in the inn, the plaintiff came to the defendant's inn, and left certain things in his chamber there; and while he was gone out, some persons came and took them away, through the neglect of the defendant and his servants, *per tort, et enconter les peas*, and to the damage of the plaintiff, &c. and he had (says the Report) a writ upon the whole matter *according to his case*; and the action was held good (a).

In the foregoing cases there was no debate upon the form of the action; in the following some few objections were started, which serve to give a better idea of the notion they then entertained of these special writs. An action of trespass was brought against a farrier, for that being employed to shoe the plaintiff's horse, *quare clavum fixit in pede equi sui in certo loco per quod proficuum equi sui per longum tempus amisit*, &c. To this writ it was objected, that it was in trespass, and yet was not laid *vi et armis*. It was answered, that the plaintiff's writ was *according to his case*, and therefore good; and though it was still urged that the writ should say *vi et armis*, or *malitiosè fixit*, and if any trespass was done, it ought to be *against the peace*, yet the writ was held good (b).

This seemed to be giving up the idea of trespass intirely. But notwithstanding this reasoning, we find the name was still preserved; for, two years afterwards, there is a report of a writ of *trespas sur son case* brought by a man against a surgeon, much upon the same ground as that just mentioned.

(a) 42 Ed. III. 13.

(b) 46 Ed. III. 19. pl.

The writ stated, that the plaintiff's right hand had been hurt, and the defendant undertook to cure it; but by the negligence of the defendant, and his want of care, his hand was made so much worse, as to become a mayhem, *à tort et à ses damages*, and the writ was neither *vi et armis*, nor *contra pacem*. However, this was held good, and treated as an action of trespass: and yet, because it did not allege force and arms, and *contra pacem*, it was considered, so far, as differing from trespass, properly so called; and for that reason it was the opinion of one of the justices, that the defendant should be admitted to wage his law (a).

The following is termed by the Reporter trespass *upon the case*, and yet is laid *vi et armis*, and *contra pacem*. It was brought against a miller, and the writ charged, *quòd cum prædictus Johannes, &c. et antecessores sui à tempore cujus memoria non existit, molere debuerunt sine multurâ, &c. prædictus defendens, &c. prædictum querentem sine multurâ molere vi et armis impedivit, &c.* Upon this the plaintiff declared, that when he came to have his corn ground, the defendant took two bushels, &c. with force and arms. It was objected to this, that as the plaintiff, in his declaration, stated that the defendant *took toll*, he might have had a general writ of *cepit et asportavit* his corn with force and arms, and not this special writ. To this it was answered, that surely the plaintiff, if he had sustained an injury, was entitled to a remedy applicable to his case. But the court decided, that as he must have brought a general writ if all his corn had been taken, so he must if part was; and therefore it was held that this writ was not good (b). However, about three years afterwards the same writ was held good (c). Again, we find an action of trespass against a woman for burning the plaintiff's house with force and

(a) 48 Ed. III. 15.

(b) 41 Ed. III. 24.

(c) 44 Ed. III. 20.

arms. There was no debate upon the form of the writ, though the jury found that the house was burnt by negligence, and not with force and arms, or malice, and that the house in question was rented by the woman from the plaintiff, from year to year (a).

From the foregoing instances it appears not to have been well agreed when the proper remedy was a general common law writ of trespass, and when a special writ; nor again, when a special writ should be laid *vi et armis*, and when not. These were difficulties in this new remedy, which were left to be settled by the refined notions that obtained in after-times upon this subject. The great motive to inserting *vi et armis* was, that the plaintiff became thereby entitled to process of *capias*, and the defendant could not wage his law; whereas in a writ not containing that suggestion, there lay only *distringas*, and the defendant might wage his law.

Thus far of particular actions: we shall next Proceedings by bill, &c. speak of the proceeding and process, which were more or less applicable to all the foregoing writs. Whatever conjectures may be formed concerning the origin of proceedings *by bill*, it is beyond all question that actions were brought in this way during all this reign, and the books are full of them. But we are not enabled to pronounce upon the nature and properties of this new method, as no debate arose upon it. We can only say, that they proceeded by bill in all the three courts, of king's bench, common pleas, and exchequer; that the bill begun *A. queritur de B. &c.* and went on as a common writ; nor does it appear, from any of the cases reported, that in bills in the king's bench there was any mention of the custody of the marshal. If that was the ground of jurisdiction, it was so understood, and not thought necessary to be alleged. The bills in the exchequer are in general against sheriffs, who

(a) 48 Ed. III. 25.

may be considered as privileged persons, in the light of king's officers. The bills in the common pleas were sometimes for and against attornies. There is one brought *quintam pro domino rege, quàm pro seipso*; and was for an assault by a person, who, being plaintiff in an action in that court, was, while bringing a writing thither to prove his case, attached by the defendant (a). This being a contempt of the king's peace and justice, might for that reason be considered as the subject of an action in that form. It was laid down, that a person might have an appeal by bill in the king's bench of any matter that touched the king, whether mediately or immediately (b). For further information on this subject, we must wait till we arrive at later times, when they began to speak more plainly about the commencing of actions by bill, and the extent of this privilege was explained upon certain and settled rules.

There was another course by which matters used to be commenced or forwarded in court, which was by *surmise* or *suggestion*. In one sense of these terms (and the original one), in all probability, nothing more was meant than a verbal application, praying that process might issue for carrying on a suit already commenced; and in that sense we frequently meet, in the Reports of this reign, with a *suggestion to the court* (c). But there certainly was in the exchequer an original commencement of a suit, as has been mentioned in another place, by a mere verbal surmise or suggestion (d); and though this was sometimes disputed in the case of common persons, yet it was still held to be the course of that court, and, in the case of the king, was not attempted to be withstood (e). This was the shape in which that proceeding first shewed itself, which afterwards grew into an *information*.

(a) 39 Ass. 14. (b) 17 Ass. 5. (c) Passim. (d) Vid. ant. vol. II. 424.

(e) 40 Ass. 35.

Pleading in causes was carried on through great part of this reign much in the way in which it was described in the former period; but it is said (*a*), that about the middle of this reign it became the practice to draw up the declaration and pleas out of court, and deliver them in writing to the prothonotary, from whom the adverse party received a copy, to enable him to give in his plea in answer. The book intitled *Novæ Narrationes* is adduced as a confirmation of such conjecture. But this seems to give little credit to a conjecture otherwise without foundation. There appears nothing in the Reports of this reign to assure us of any such alterations; for they state the pleading on both sides in the same manner as the Reports of the time of Edward II. as though they were debated *viva voce* in court. Yet it cannot be denied, that, towards the latter part of this king's time, pleading was brought to more certainty and system than it had before exhibited; such as it was natural should follow from the deliberation with which proceedings might be penned when drawn out of court. It is therefore truly said by Sir Matthew Hale, that pleadings were now somewhat more polished than in the former reign, without running into uncertainty, prolixity or obscurity (*b*). The putting of pleadings into writing was the first step towards the refinement and subtlety affected by pleaders in after-times; though at present they went no further than was necessary to bring the matter in question before the court with due clearness and precision.

Sufficient has been said, in speaking of different actions, to give some idea of the state of pleading at this period: what remains to be added will be very short and general. It seems, that in the beginning of this reign the order of pleading to the count before the writ began to obtain in

(*a*) Gilbert's Orig. of King's Bench.

(*b*) Hist. Com. Law, 173.

practice; for it is said in the 4th year, that after *oyer* of the writ (which was necessary previous to its being pleaded to) the defendant should not plead to the count (*a*); and though afterwards (*b*) the contrary was permitted, yet a few years after, namely, in the 30th year, it seems to have been settled in the following way: that a defendant should plead first to the jurisdiction, then to the person of the plaintiff or defendant, then to the count, then to the writ, and lastly to the action (*c*). There might be reasons of convenience and propriety which contributed to establish this course. When pleadings were put into writing, it was natural that the count should become more strict and formal; and, as it contained the substance of the writ, it was sufficiently full and explicit to become the first object of criticism to the defendant, as the writ had been in earlier times (*d*); the defendant therefore in his defence was expected first to take notice of that, or intirely to waive all objections to it.

The fashion of these times was to state special matter of justification or title in almost all actions, and to avoid as much as possible the general issue: this led to much vying and revying on both sides. Perhaps this arose from the nature of assises and real actions, which being special in their form and for the trial of some title, necessarily called upon the parties to be particular in their pleadings: the personal actions in use naturally partook of the prevailing taste; not to mention, that in trespass and replevin some question of title was very often litigated.

The *secta* and law
wager. We have seen in the preceding reign (*e*), that the practice of examining the *secta* of the plaintiff had ceased, though they still continued to be produced: but since they had thus become almost useless, it may be doubted whe-

(*a*) 4 Ed. III. 133, 134. (*b*) 24 Ed. III. 35. 47. (*c*) Thel. Dig. lib. 10. c. 1. 21. (*d*) Vid. ant. vol. II. 266, 267. (*e*) Vid. ant. vol. II. 332.

ther now they continued even to be produced ; at least, there is no mention of the *secta* all through this reign ; though the formal conclusion of declarations by *inde producit sectam*, as it was still used, preserved a remembrance of the old practice. The *secta*, however, were still produced by a defendant, who waged his law, though it may be presumed they were never examined ; as the only object of such examination had formerly been, to confront them, and weigh their evidence against that of the plaintiff's *secta*.

The law-wager did not seem to be settled upon such fixed principles, as to leave no doubt about the instances where it should, and where it should not, be allowed : we find some difference of opinion upon this point. The state in which this piece of old law stood in this reign, will be better understood from a short view of some adjudged cases.

We have before seen, that a defendant was not permitted to wage his law against an obligation : however, though he could not deny the obligation, and the debt grounded thereon, in this way ; he was allowed, in an action upon a deed, the privilege of waging his law of non-summons, and the like, in the same manner as had long been used (*a*). The following are some instances of law-wager. In accompt, the defendant said, that he gave the plaintiff a statute for the debt, and a tunnel of wine for the damages ; to which the plaintiff replied, that he never received them, and tendered his law, which was received (*b*) ; the issue being considered as in the nature of the general issue in detinue, where the law-wager was the common trial. In an action of accompt where the receipt was alleged to be by the hands of another, the law-wager was allowed (*c*) ; the same also in debt upon the arrear of an account (*d*).

(*a*) 28 Ed. III. 100. a. 29 Ed. III. 44. b. (*b*) 30 Ed. III. 4. b.

(*c*) 47 Ed. III. 18. (*d*) 49 Ed. III. 3. 43 Ed. III. 1. a.

In detinue of charters law-wager was allowed (*a*), notwithstanding it was urged, that charters being things relating to the freehold, ought to take the action out of the common course, like an obligation upon which an action of debt was founded. In another action, some years after, for detaining charters, this matter was argued again, and a difference seems to have been taken between a *general* declaration for charters, and one that specified the charters detained; upon which the plaintiff had leave to amend; and, after specifying the charters, the defendant was forced to plead to the country (*b*): this, however, was of a bailment to the predecessor of the defendant, who was dean of a church, which was an additional reason for putting it to the country.

It was held, that law-wager should not lie in debt for recovery of rent, because it was connected with the realty (*c*). The rent in this case consisted not in money, but in corn and other things; and the action was laid, not in debt, but as for a *detinet* of those articles; upon which ground it was that the defendant offered his law-wager; and upon the above reason it was refused.

In an attachment upon a prohibition, the defendant was not suffered to wage his law; for it was said, that suing in the spiritual court was a trespass and contempt of the king's writ and authority, and in such case no wager at law could be allowed (*d*). Notwithstanding this determination, it was allowed in a subsequent case, though in another they returned back to the first resolution, and so settled the law (*e*). Indeed it was held generally, that no defendant could wage his law against the king (*f*), for which reason it was never allowed in the court of exchequer. It was held, that

(*a*) 38 Ed. III. 7. a. (*b*) 44 Ed. III. 41. b. (*c*) 50 Ed. III. 16. b. (*d*) 18 Ed. III. 4. a. (*e*) 24 Ed. III. 39. a. 44 Ed. III. 32. (*f*) 50 Ed. III. 1.

where a testator might wage his law, his executors might also (a).

The trial by *proofs*, which is so often mentioned in Glanville and Bracton (b), continued still in use, though its application was extremely circumscribed. It seems to have been resorted to only in such cases where the matter could not, by construction of law, be supposed to be within the knowledge of the *pais* or country. The most common instances we meet with of this trial were, where the husband was alleged to be alive in another county. Thus, in an assise brought by woman, *quæ fuit uxor B.* the tenant said, that *B.* was alive in another county, and he was ready to *prove* it; that is, to put it on the trial by proofs. To this it was answered by the other side, that this amounted to the issue of *covert baron*, which was triable by the assise; therefore they prayed the assise might pass. But it was the opinion of the court, that this point had formerly been always tried by *proof*, and so it must continue; yet, they said, had the assise been brought without the plaintiff alleging *quæ fuit uxor B.* it would have been otherwise. If the deed of an ancestor was pleaded, and it was contended on the other side that such ancestor was alive in another county, or beyond sea; it was the opinion of some, that this should be tried by the assise, and not by *proofs* (c). In an assise against baron and feme, the baron did not appear, but the wife did, and pleaded the death of the baron in a foreign county; upon which the plaintiff prayed the assise, without alleging the baron to be alive in the first county: but this creating a difficulty, the justices adjourned it to Westminster, where it was adjudged that it should be tried by *proofs* (d). Again, in an appeal in the king's bench, by a woman, for the death of her husband, in the county of

(a) 29 Ed. III. 36. b. 37. a.
and vol. II. 259, 260.

(b) Vid. ant. vol. I. 126. 161. 143. 381.

(c) 36 Ass. 5.

(d) 39 Ass. 9.

B. the defendant said, that he was alive in the county of *N.* and they had a day given them to bring their *proofs* on both sides; one to prove the death, the other the life of the party (*a*). This trial in appeal was considered as peremptory; and therefore, if there was a doubt of succeeding, they would withdraw that plea, and plead the general issue, not guilty (*b*).

The foregoing trials were all upon one point: the following was of another sort. In an assise there arose the issue, whether the priory of *D.* was donative and removable, or perpetual; and the Reporter says, it should seem this ought to be tried by the assise, and not by *proofs*; because it lay in the knowledge of the *pais*, whether the priors had enjoyed the land all their lives, and acted as lawful owners all that time: but it was said by *Percy*, that as the prior was a prior alien, and the chief priory was beyond sea, it should be tried by *proofs* (*c*). It may be observed, that the formal words by which a party signified that he meant to make out what he asserted *per pais*, namely, that he was ready to *verify* it, seemed to import a higher confidence in this decision than in any other; and again, while the evidence of proofs could no more than *prove* the matter on one side and the other, the determination of the jury was called *veredictum*, that is, as it should seem, a verity not to be controverted.

There were other methods of enquiry, which might be called trials *per proves*, and were the remains of the old jurisprudence. A recovery by default in dower on a *petit cape* was pleaded in an assise, and the plaintiff said the land in question was not comprised in that recovery. This was to be tried by the summoners and viewers in the first action; and if it had been upon a *grand cape*, then by the summoners, viewers, and perrors (*d*). In other cases, where land

(a) 41 Ass. 5.

(b) 43 Ass. 26.

(c) 43 Ass. 4.

(d) 48 Ed III. 11.

was to be identified, there was a mixed trial, consisting partly of the *pais*, and partly of proofs: as where, in an assise, there arose an issue, whether the land in question was extended, and put in execution under a statute merchant; there process was awarded against the extendors to be joined with the assise to try the issue (*a*). Where a recovery was pleaded in a former assise before the same justices, and the plaintiff said they were not the same tenements, he put himself to prove it *per primos juratores et per alios*, and it was tried in that manner (*b*). This trial by the former jurors, and by others, was very common where a former recovery was in question (*c*). The practice of joining the witnesses in a deed to the pannel of jurors, was very ancient, and continued still in use, as will be seen presently.

Another mode of trial was by the certificate of the bishop, who had cognizance in certain questions of a supposed spiritual nature. Much debate had been occasioned by the contests about spiritual jurisdiction between the lay and ecclesiastical courts. When the grand bounds of these two tribunals were settled by parliament, and by long usage, there apparently still remained disputes about terms, which led into many subtle explanations and artificial distinctions. Though it was beyond all question, that, in cases of general bastardy, matrimony, profession, divorce, and the like, the court christian was to determine; yet it was held, that even those points might be brought into debate in such a way, as to draw the cognizance of them from the spiritual to the lay tribunal. It depended therefore upon the pleading, and the form of the issue (*d*), whether they were to be tried by certificate or *per pais*. So minutely were these pretended distinctions refined upon, that they did not always escape the charge of contradiction.

(*a*) 31 Ass. 6.
vol. I. 466.

(*b*) 22 Ass. 16.

(*c*) 40 Ass. 4.

(*d*) Vid ant.

In an assise by baron and feme, it was alleged by the tenant, that there had been a divorce between the plaintiffs, and one of them had since been married to the tenant, therefore she was the wife of the tenant, and not of the plaintiff. After much debate and argument, it was held, this should be tried by the *pais*, and not by certificate of the ordinary; and this was on account of the conclusion of the plea, *et essent nient son feme* (a): for if he had rested upon the divorce only, that being wholly a spiritual matter, must have gone to that tribunal; but the conclusion being a matter *in pais*, brought the whole before the country (b). This distinction may help to reconcile many of the cases. Thus, where the issue in *quare impedit* was *void*, or *not void*, it was to be tried by the country; but otherwise if it had been *full*, or *not full*; for plenarty was to be tried by the court christian (c), which alone could judge of it. Where the issue was, whether the maker of a deed was professed the day he made it, it was tried by the country; because, though the profession was properly to be tried by the certificate of the ordinary, yet here the profession was admitted, and the doubt was only upon the time when the deed was made (d). On the other hand, where imprisonment was alleged in the ordinary's prison, at the time of the outlawry, it was tried by certificate (e). It seems, that it had become the practice to try by the country even the direct questions of profession, general bastardy, and the like, if alleged in a person who was dead, or a stranger to the action. This had been done in some possessory actions, particularly in assises, where dispatch might be thought some apology for the innovation; but this was not universally approved, and they seem to have recurred sometimes to one tribunal, and sometimes to another, according to the opinion of different judges (f).

(a) 39 Ed. III. 31. (b) 39 Ass. 8. (c) 40 Ed. III. 20. (d) 44 Ass. 10. (e) Bro. Triall 140. (f) 38 Ass. 30. 41 Ed. III. 37. 42 Ed. III. 8.

Upon the whole, the law seemed to stand thus: That the issues of *feme* or *not feme covert*, of *sole parson* or *not parson*, born before espousals or after, and the like points, which were mere temporal facts, were to be tried by the *pais*; but the direct points of general bastardy, *ne unque accouple in loyal matrimony*, profession, bigamy, divorce, ability in a parson, and the like matters of spiritual cognizance, were to be tried by the bishop's certificate. Yet, owing to the forms of some actions, as well as to the way of pleading above stated, these direct issues on spiritual matters were mostly avoided. Thus, where a woman demanded land of her own possession, or of a possession with her husband, as in an assise, in a *cui in vita*, and other possessory writs, the issue of *ne unque accouple*, &c. could not arise: but it was otherwise in dower, and an appeal *de morte viri*, for there she claimed *through* her husband (a). The nature of possessory actions was such, that the above issues seldom arose between the parties, but connected with such circumstances as made them very proper objects to be enquired of by the country; which consideration was assisted by a general propensity rather to commit the trial to a jury, than to the ecclesiastical judge.

In proportion as any of the foregoing trials gave way, the trial by the country succeeded in its place: this mode of trial became every day more common. As it grew more frequent, its nature and properties were more discussed and better understood, and the rules by which it was to be governed became settled upon principle. The learning upon this mode of trial consisted in the qualifications of the jurors, the manner of giving their verdict, and the subject matter that was within their cognizance.

The idea of jurors being of the vicinage where the fact to be tried had happened, was in some measure given

(a) 40 Ass. 17. 40 Ed. III. 25. 49 Ed. III. 18. 50 Ed. III. 19.

up; for they were now to enquire for the body of the county, and it was sufficient if there were two of the hundred to inform the rest: however, it was a good cause of challenge if there were no hundredors (*a*). If the venue was awarded out of two counties (as it was in some cases) each sheriff was to return twenty-four jurors, and there ought regularly to be six of each upon the inquest; though should it appear upon examination of the jurors that there were not six in town, the inquest might be supplied from others (*b*). In all cases where there were not sufficient of the jury returned, after defaults or challenges, the plaintiff might pray a *tales*, as it was called, to the amount of ten, but not further (*c*); for though *decem tales* was common, says the book, we never heard of *undecim tales*; notwithstanding, in an attaint eighteen *tales* were allowed to make up the jury of twenty-four (*d*). Where an assault happened in Westminster-hall, and it was prosecuted by bill in the king's bench, a jury was awarded of those persons who kept shops in the hall (*e*). In order that the jury might be above all exception, the causes of *challenge* were very numerous: these were either to the *array*, or to the *polls*. If a juror was nominated by either party, if the sheriff was *des robes*, as they called it, to either party, these were challenges to the array; the sheriff not being supposed sufficiently impartial to return an indifferent jury (*f*). If a juror was a relation, even in the remote degrees, as in the eleventh degree, or if he held lands in lease of either party, it was a good challenge to the *poll* (*g*). When such distant apprehensions of favour in jurors were regarded as legal objections, it is easy to imagine how much argument might be raised on the subject of challenges (*h*).

(*a*) 13 Ass. 12. (*b*) 48 Ed. III. 29. (*c*) 47 Ass. 11. (*d*) 21 Ed. III. 43.
 (*e*) 42 Ass. 18. (*f*) 38 Ed. III. 25. 49 Ed. III. 1.
 (*g*) 41 Ed. III. 9. 21 Ed. III. 41. (*h*) Vid. ant. vol. I. 329.

A challenge of the array used to be tried by the coroners ; and if it was found against the sheriff, the *venire* would be directed to the coroners. A challenge of the *polls* would be tried by two of the jurors already sworn, if so many were sworn, otherwise by some persons *de circumstantibus* (a).

We have seen the method which had got into practice in the time (b) of Edward I. of compelling a jury to agree in their verdict. This authority over jurors seems to have been exercised by judges with very little scruple. Some instances of the treatment experienced by jurors in this reign will shew the notions entertained by our ancestors concerning this proceeding. In the eighth year of the king, in a writ of *mortauncestor*, a juror who had delayed his companions a day and a night because he would not agree with them, and this (as the book says) without any good reason, was committed to the *Fleet*, and was afterwards let to mainprize, till the court were advised what step to take with him. In the third year, where, in an action of trespass, one of the jury would not agree, the judge took the verdict of the eleven, and committed the twelfth to prison (c). The same was done in the twenty-third year (d). But the taking a verdict *ex dicto majoris partis juratorum*, though conformable with the old practice (e), began to go out of use towards the latter end of this reign ; for in the fortieth year, when eleven gave their verdict without assent of the twelfth, they were fined by the justices (f).

In the next year this point was debated, and finally settled. In an assise, all the jurors were agreed except one, who could not be brought to concur with them ; they were therefore remanded, and remained all that day and the

(a) 21 Ass. 26. 20 Ass. 10. (b) Vid. ant. vol. II. 267. (c) Fitz. Verd. 40. (d) Bro. Jurors 53. (e) Vid. ant. vol. I. 268. (f) 40 Ass. 10.

next without eating or drinking; and then, being asked by the justices if they were agreed, the dissentient answered No, and that he would first die in prison; upon which the justices took the verdict of the eleven, and committed the single juror to prison. But when judgment was prayed in the common bench upon this verdict, the justices were unanimously of opinion, *that a verdict from eleven jurors was no verdict at all*: and when it was urged that former judges had taken verdicts of eleven, both in an assise and trespass, and particularly mentioned one taken in the twentieth year of the king; *Thorpe*, one of the justices, said, that it was not an example for them to follow, for that judge had been greatly censured for it (*a*); and it was said by the bench, that the justices ought to have carried the jurors about with them in carts till they were agreed. Thus it was settled at the close of this reign, that the jurors must be unanimous in the verdict, and the justices were to put them under restraint, if necessary, to produce such unanimity. If the jurors, when committed to the care of the sheriff, ate or drank or went at large, the verdict was void, and the party might have a new *venire* (*b*). It happened, when a jury were put together to consider of their verdict, one of them secretly withdrew himself: for this contempt he was fined and imprisoned, and another sworn in his place (*c*). This compulsory power over jurors extended even to the pannel; for where a false return of jurors was made by the bailiff of a franchise, the justices reformed the pannel (*d*).

To relieve themselves from the difficulty of deciding, the jurors might find their verdict *at large* (*e*), as it was called; that is, they might state the special circumstances, and leave it to the discretion of the court to make the conclu-

(*a*) 41 Ass. 11.

(*b*) 4 Ed. III. 24.

(*c*) Bro. Jur. 46.

(*d*) 41 Ed. III. 26.

(*e*) Vid. ant. 23.

sion thereon: and they might do this, as well on a special as a general issue (*a*). In such verdicts, it was not uncommon for the jury to find *fin*es, and other matters of record; for though they could not be compelled to find matters of record, they might, if they so pleased (*b*).

There was great doubt, how far the jurors might take cognizance of matters that happened out of the county; nor does there seem to have been any principle yet agreed upon, which enables us to pronounce with confidence as to the general law upon this point. Perhaps, the distinct jurisdiction between counties depended much on the same sort of reasoning as that between the spiritual and temporal courts; so that though the jury of one county could not find a fact which was *necessarily* of a *local* nature, and had happened in another county, yet they might judge of matters that were only *accidentally* so, or dependent upon such local fact. Thus it was held, that the jurors in assise could not find a *dying seised* in another county, but they might find the *dying* simply (*c*). It may be observed, that the general propensity of courts was, to confine jurors to the cognizance only of such things as happened within their own county.

If there was any doubt concerning the competency of the jurors of one county to take notice of facts happening in another, there was not less difficulty in deciding from what county the jurors should be chosen to try an issue when joined. It was usual in pleading, for the parties to allege the locality of facts conform-^{Of the venue.} ably with the real truth; so that in the course of pleading, two or more different counties might be mentioned as the places where several scenes of the transaction in question had passed. When a fact was said by one party to have happened in the county of *A*. and by the other in the

(*a*) 22 Ass. 60. 38 Ass. 9. 18 Ass. 3. 30 Ed. III. 23. & passim. (*b*) Bro. Jur. 39. 26 Ass. 50. (*c*) 1 Ass. 16.

county of *B.* and the writ perhaps had been brought in the county of *C.* it required some technical distinctions to ascertain whence the jurors should be brought to try the fact in dispute. One sort of reasoning prevailed at one time, a different one at another ; and there seems to have been very few cases where any fixed rule was laid down, to govern the court in awarding the *venire facias* to one county or another.

It was repeatedly debated, whence the vicinage should come to try the issue of villenage. It seemed natural to try this by the vicinage where the villenage was alleged to be, and so it was in the old law (*a*). We find in the 39th of the king, that practice still continued ; for being at issue, whether the demandant was a villain regardant to the manor of *T.* in the county of *N.* or a bastard ; and the manor was in one county, and the birth alleged in another ; the venue was awarded in the county where the manor was (*b*). But in the next year, when an issue arose like the former, the venue was not awarded where the manor lay, but where the writ was brought (*c*). Again, in the 43d year, an issue of villenage arising, the venue was awarded where the manor lay, and not where the birth was alleged (*d*). Yet the next year, they seemed to have returned back to the practice of the year 41 ; and that seemed to be relied upon as the better opinion (*e*). But in the 47th year, the court were still in doubt ; and in order to settle the practice, they suspended the issue of the *venire* till they had consulted parliament, whether the *venue* should be of the county where the villenage was alleged, or where the writ was brought (*f*). What was the result of this application of the judges, we do not know ; but in the 50th year there was a petition to parliament, praying, that wherever a question arose concerning a man's birth, in pleas of

(*a*) Vid. ant. vol. I. 143.

(*b*) 39 Ed. III. 36.

(*c*) 40 Ed. III. 36.

(*d*) 43 Ed. III. 4.

(*e*) 44 Ed. III. 6.

(*f*) 47 Ed. III. 26, 27.

freehold or inheritance, the inquest might be of the county where the birth was laid, and not where the writ was brought; this petition, however, was rejected (*a*).

The two guides for settling the venue seemed to be the *land*, and the fact alleged; and when the balance was thought to stand equally between them, there was sometimes a venue from both. Where it was indifferent, the jury naturally came from the county where the writ had supposed the transaction. All this will be better understood by some examples. In the first place, of land. It was settled, that in debt for rent on a lease for years, if any fact, as payment, an agreement, or the like, was alleged in another county, it should, notwithstanding, be tried where the land lay (*b*), although there was an issue upon the very deed granting the lease (*c*). In a writ of *per quæ servitia*, non-tenure was pleaded; and though the manor was in *N.* and the writ brought there, yet, the land being in *S.* the venue came from thence (*d*).

Secondly, as to the *fact*. In a writ of annuity where the seisin was alleged in a different county from that where the land lay, and that where the writ was brought, the venue came from the county where the seisin was alleged (*e*). In debt by an administrator, the defendant pleaded, that the deceased made executors, and died in a foreign county; the plaintiff replied, that he died intestate: here the venue was in the foreign county (*f*). A release was pleaded; the venue was, where the deed bore date, and not where the land lay (*g*). In a plea of covenants performed in a foreign county, the venue was from thence; and this was laid down as a general rule (*h*); but not so where conditions were pleaded, and alleged at another place (*i*).

(*a*) Cott. Abrid. 50 Ed. III. 152.

(*b*) 44 Ed. III. 42. 45 Ed. III. 3.

(*c*) 45 Ed. III. 8.

(*d*) 21 Ed. III. 18.

(*e*) 49 Ed. III. 5. 48 Ed. III. 26.

(*f*) 44 Ed. III. 16.

(*g*) 44 Ed. III. 34.

(*h*) 44 Ed. III. 42.

(*i*) 45

Ed. III. 15.

If imprisonment was pleaded, the jury was to come from the place where the imprisonment was alleged (*a*). In an action of debt, there was a plea of a bailment in pledge at *L.* and the venue was awarded from *L.* In dower, where the tenant pleaded elopement of the demandant from her husband at *D.* in the county of *S.* and residing with the adulterer in *London*, the venue came from *London* (*b*). In accompt, the defendant pleaded infancy at the time of the receipt, and said, that he was born at *B.* in another county; but the jury came from the county where the receipt was alleged (*c*). Again, in *quare impedit*, upon disability pleaded, the plaintiff said he was examined at *D.* in the county of *C.* and the writ was brought in *D.* but the jury came from *C.* (*d*). When the venue was governed by the fact, it always followed the plea of the defendant, and not the replication; as where the defendant said, that the plaintiff and others took away his wife in the county of *K.* and there detain her; the plaintiff replied, that she was at large in *C.*; here the venue came from *K.* (*e*). So when the tenant pleaded a warranty in the county of *S.* and the plaintiff replied, that the warrantor was still alive in *D.* the venue was from *S.* (*f*); these being cases where the fact alleged by the defendant would in subsequent times have been traversed, and so brought directly in issue.

A replevin was brought in Middlesex, the defendant avowed for homage; the plaintiff pleaded tender of homage in the county of Sussex, and the venue was awarded in that county (*g*). Where there was eloignement in one county, and receipt in another, and issue was joined on the receipt, the venue was in the county where the receipt was alleged (*h*). In an assise of rent, upon the issue of *ne*

(*a*) 45 Ed. III. 15. (*b*) 46 Ed. III. 30. 47 Ed. III. 25. (*c*) 2 Ed. III. 7, 8. (*d*) 39 Ed. III. 2. (*e*) 11 Ass. 7. (*f*) 11 Ass. 18. (*g*) 21 Ed. III. 11. (*h*) 21 Ed. III. 48.

charga pas, the venue came from the county where the deed was made; which was said to be a constant rule where *non est factum* was pleaded (*a*). Yet, in a *quare impedit*, it was doubted whether the deed of grant of the advowson should be tried where it was made, or where the church was (*b*).

The following were instances where a venue of two counties was agitated or awarded. In an assise, they were at issue on a special bastardy, and the espousals and birth were alleged in a foreign county. There seemed an inclination to try it by a venue of both counties (*c*); but in the next year a bastardy alleged in a foreign county was tried by the assise (*d*). Yet in the same year, where a bastardy was alleged in an assise, it was tried by a venue of both counties, though not without long argument (*e*). And thus stood the law as to bastardy at the close of this reign. In trespass in the county of *E*. the defendant justified for common appendant to land in the county of *W*. and the venue was awarded of both counties (*f*). Where trespass was laid in *B*. against two, and one defendant pleaded not guilty, and the other a release at *A*. there was a venue of both counties (*g*). Again, where a release was pleaded, and the party replied that he was within age when he executed it, the venue was awarded both of the county where the deed was made and where he was born (*h*). As a venue might be had out of two counties, so might it out of two districts, or smaller jurisdictions. In an assise of common in one franchise, appendant to land in another franchise, the jurors were to come from both the franchises; and it was said, the assise could not be taken by the men of one franchise alone, any more than in an assise in *confinio comitatûs*,

(*a*) 26 Ass. 3. (*b*) 43 Ed. III. 1. (*c*) 45 Ass. 12. (*d*) 46 Ass. 3.
 (*e*) 46 Ed. III. 6. (*f*) 49 Ed. III. 19. (*g*) 50 Ed. III. 1. (*h*) 38
 Ed. III. 17.

which could not be taken by the men of one county only (*a*). Again, in an appeal of mayhem in the ward of *Cheap*, the defendant pleaded *son assault demesne*, and in his own defence, in the ward of *Cornhill*; and the jury came from both wards (*b*).

If no venue was laid in the plea (which sometimes, though not often, did happen), the fact was taken to be in the county alleged by the plaintiff (*c*). The option of the plaintiff to chuse the county in which he would bring his action seemed of little value; for if he laid it in a foreign county, he might be brought back, by the pleading of the defendant, to try it in the true one: or if he brought it in the true county, some justification or discharge might be set up, which would carry the trial to another; the consequence of which was, that there was little debate about the venue which the plaintiff chose for his declaration. There are, however, some determinations upon that point. It was held, that an action of accompt against the bailiff of a manor should be brought in the county where the manor was. Detinue might be brought either where the detinue or where the bailment was alleged. *Warrantia chartæ* might be brought in another county than where the land lay (*d*). An action on the statute of labourers might be brought either where the retainer was, or where the departure of the servant was alleged (*e*). An attachment on a prohibition was to be brought where the summons to appear had been served (*f*). Where a person was taken in one county, and carried into another, it was said, there might be separate actions of false imprisonment: the same where a distress was taken in one county, and carried into another (*g*). A *quare impedit* was to be brought where the preferment lay that was in question; but we find the king brought a writ in a foreign county, and it was held

(*a*) 30 Ass. 42. (*b*) 41 Ass. 21. (*c*) 21 Ed. III. 10. (*d*) 40 Ed. III. 4.
 (*e*) 41 Ed. III. 1. (*f*) 42 Ed. III. 14. (*g*) 38 Ed. III. 34.

well (*a*). Forfeiture of marriage was to be brought where the tender was (*b*); a writ of ward in the county where the land lay (*c*).

Whenever the witnesses to a deed were joined with the jurors, they so far differed from the pannel, that they could not be challenged, nor was their concurrence necessary to complete the verdict (*d*). It was a rule, that the jurors should be exempt from attain, if the witnesses agreed with them; but if they dissented, the jurors were liable, as in other cases. Process might be had against witnesses, even where a deed was not denied directly, but the issue was upon the effect and consequence of it; as, *il ne charga pas per le fait, ne releasa pas*, and the like (*e*).

Very little has yet been said on the process of *capias*, and writs of execution: the latter are passed over in silence by Bracton, and it was of late that the former had become of much use. We have seen that the writ of *capias*, being a process of contempt (*f*), did not issue without special award of the court; and in granting it, whether Of process. in cases where it lay at common law, or where it had been ordained by the late statutes, the court exercised a discretion according to the circumstances of the case. In an action for a bag of charters, it was said, that this was a matter of too little importance to award a *capias*, and therefore it was denied (*g*). The bag, and not the charters, being the only pretence for the writ, they thought themselves justified if they were governed by the value of that, without any regard to the importance of the charters; for these, being considered as chattels *real*, were not, they said, such chattels whose detinue could entitle the plaintiff to a *capias*, under the statute of this king. Again, in an ac-

(*a*) 21 Ed. III. 5. 4 Ed. III. 9. (*b*) Fitz. Visne, 4. (*c*) 31 Ed. III. 42.

(*d*) 12 Ass. 12. 23 Ass. 11. (*e*) 23 Ass. 11. 43 Ed. III. 2. 41 Ass. 23.

(*f*) Vid. ant. vol. II. 343. (*g*) 42 Ed. III. 13.

tion of trespass against an innkeeper for goods, which a guest lost while in his inn, the court would not award a *capias* upon the judgment, though the writ was *contra pacem*; saying, that it was found by the jury to be only negligence; and a man was not to be sent to prison for negligence only, where he had committed no *tort* (a). It seemed to be held, that where the defendant appeared upon the *distringas* in the mesne process, he was not liable to a *capias ad satisfaciendum* upon the judgment, but only to a *distringas ad satisfaciendum* (b): and a *capias* in no case was allowed against an archbishop, bishop, abbot, or prior, nor against an earl, baron, or knight, because it was presumed that such persons must have sufficient whereby they might be distrained (c).

The common writs of execution were *elegit*, *feri facias*, and *capias*; besides that above-mentioned of *distringas ad satisfaciendum*, where the defendant was to be compelled to make specific redress, as in detinue. It was settled, that a *capias* might be issued after a *feri facias*, and a *nihil* returned (d). But after taking the body, no *feri facias* nor *elegit* could be had, the person of the defendant being considered as a full execution (e); nor could the body be taken after an *elegit* (f). An *elegit* might be sued into as many counties as the plaintiff pleased (g). As the land was bound from the time of the judgment only, an application had been made to parliament, that it might be bound from the date of the original writ; but no alteration was made (h). Upon an *elegit*, all chattels were to be levied, under which were included (as we have seen) a lease for years; lands in ward, or in execution under a statute (i). A gift of goods after judgment was void, and the officer might

(a) 42 Ed. III. 11. (b) 49 Ed. III. 2. Vid. ant. vol. II. 187, in the note.
 (c) O. N. B. 61. (d) 45 Ed. III. 19. (e) 22 Ass. 43. (f) 50
 Ed. III. 4. (g) 47 Ed. III. 26. (h) Cott. Abrid. (i) 31 Ass. 6.

levy them under an *elegit*, or *fieri facias*, notwithstanding any sale or gift, they being bound by the judgment (a). A person taken upon a *capias ad satisfaciendum*, was not to be suffered to go at large, though he had found mainper-nors: the same, if he was charged on a *capius pro fine* (b). And if he escaped, another *capias* might be had, as well as an action against the gaoler (c). The established practice was, upon the return of the first *capias ad satisfaciendum*, to issue an *exigent*, and so to proceed to outlawry.

Several statutes were made in the reign of Edward I. to enforce the execution of process, and to punish the neglects of sheriffs or bailiffs in serving it (d). In the time of Henry III. it had been usual to amerce sheriffs for omissions and defaults of that sort; but the method of levying such amercements does not appear. A practice had now obtained, to deal with these officers in a more summary way; for the courts used to issue process to the coroners to *attach* the sheriff, and according to the nature of the case he used afterwards to be amerced (e). Where an under-sheriff, having the charge of jurors, had suffered them to eat and drink, and to go at large, a *capias ad respondendum* was awarded against him, out of the king's bench (f).

Though we have met with several statutes (g) to qualify the abuses following from writs of protection, there has not yet occurred any particular mention of them, so as to enable us to state what the tenor of them was. The two principal writs of protection were distinguished by the clause of *nolumus* and *volumus*. The latter was the most general and most ample. It was usually obtained by persons going (or pretending to go) out of the kingdom in the suite of some great man, on the king's service; and it was under the

(a) 22 Ass. 72. (b) 22 Ass. 74. (c) 26 Ass. 51. 41 Ass. 15. (d) Vid. ant. vol. II. 181. (e) 43 Ed. III. 26. 47 Ed. III. 28. (f) 24 Ed. III. 24. (g) Vid. ant. vol. II. 241.

great seal. The writ (or letters patent) was directed to all bailiffs and others, signifying, that the king had taken the bearer and all his lands and goods into his protection *quidā profecturus*, &c. because he was going out of the kingdom on the king's affairs: and they were commanded accordingly to see that his person and property were protected from all harm or injury; which protection was to last to a certain time therein mentioned. Then there followed this clause, *Volumus etiam*, &c. signifying the king's pleasure, that he should be free from all pleas and complaints, except pleas of dower *unde nihil, quare impedit*, assise of novel disseisin, darrein presentment, and attaint, and certain other pleas summoned before the justices in eyre. The protection *cum clausulâ nolumus*, was of a more confined nature: it was only had in cases where a person was in apprehension that the king, or some common person, might take his corn, hay, horses, charters, or the like; and it might be granted by any master in chancery, without a privy seal, which was necessary to obtain the former. The clause from which the writ was named, was, *Nolumus*, &c. signifying the king's pleasure, that no one should presume to take the property of the person so protected (a).

The crime of treason. We shall now consider such alterations as were made in the criminal law during this reign. The crime of treason was brought to somewhat more certainty by the famous statute made in the 25th year of this king (b). All the treasons enumerated in that act were considered as treasons before; and many that are not there mentioned, were, however, still continued by the courts to be construed treasons, notwithstanding the strict injunction of that act. In order to set this subject in a true light, we shall first mention such cases of treason in this reign as are recorded to have happened before, and then such as happened after that act.

(a) O. N. B. 21.

(b) Vid. ant. vol. II. 452.

In the 12th year of the king, a girl of thirteen years old killed her mistress, and was burnt; which shews that it was considered as a treason (a); so that killing a mistress was held equally criminal with killing a master. The punishment of such an offender was, to be drawn and hanged without any benefit of sanctuary (b). How conformable the statute of treason was with the common law as it then stood, may be judged by the following passage of a Report in the 22d of the king, which was the year when the petition was first presented to the parliament for the declaration of treason. Treasons that touch the person of the king are there instanced as follows: Imagining his death, according with his enemies, falsifying his seal, counterfeiting his money, and the like: so that coining was considered among the higher order of treasons, as stated by *The Mirror*, though it had been otherwise in the earlier times of our law. In all these treasons, on account of their heinous nature, and their near connexion with the royalty, the law allowed no person but the king to derive any emolument from them; and therefore he had the forfeiture of lands and goods. But where a master was killed by his servant, and in other inferior treasons, the escheat belonged to the lord of whom the offender held his land; all which corresponds with the language of the statute of treasons. The case in which the law was so laid down was, where a person was indicted for killing a king's messenger; which, on that occasion, was held to be of the higher order of treasons (c).

After the passing of the statute of treasons we find the following cases: A servant departed out of his service, and a year afterwards killed his former master, upon a malice, that he had conceived against him while in his service; and for this he was drawn and hanged (d). *Shard*, who was the judge on that occasion, forbade, under pain of imprisonment, that any one should furnish the prisoner with a

(a) 12 Ass. 30.

(b) 21 Ed. III. 17.

(c) 22 Ass. 49.

(d) 33 Ass. 7.

hurdle or other thing to be drawn upon; but directed that he should be dragged by horses out of the hall where judgment was passed, to the gallows. Thus *drawing* was a serious part of the sentence. In the 38th year it was held, that adhering to the king's enemies in Scotland was only felony, and not treason (a); for what reason, it is difficult to say. However, where a Norman was captain of an English ship containing several Englishmen, and they committed many robberies on the sea; it was held by *Shard*, that, inasmuch as the former *did this in the Norman tongue*, it was only felony in him; but in the others, *who did it in English*, as the Report expresses it, the fact was treason. This case is very remarkable: first, as it was neither expressly within the statute of treasons, nor declared by the advice of parliament: secondly, as it was upon the high seas; from which it should seem that the admiralty as yet did not exist, or at least affected no jurisdiction of that sort (b). The above case was held for law by the court; and it was at the same time agreed, in the case of a servant who had procured another to kill his master, that as this, if committed, was only felony in the principal, it could not be treason in the accessory.

The ideas of homicide which prevailed in the Homicide. time of Bracton, seemed still to govern (c). This was particularly observable in what was called homicide *se defendendo*, where the defendant was required to make out the absolute necessity he was under to act in his own defence. Where one pursued another with a stick, and struck him, and the person stricken again struck the pursuer, of which blow he died; here, because it was proved that the person killing might have fled, but would not, rather chusing to assault the pursuer, it was held to be felony (d). Where the deceased had thrown the defendant to the ground, and drew

(a) Bro. Cor. 36.

(b) 40 Ass. 25.

(c) Vid. ant. vol. II. 9.

7. 22 A 22 (b)

22 A 22 (b)

(d) 43 Ass. 31.

43 Ass. 31 (d)

43 Ass. 31 (d)

his knife to kill him, and the defendant, while upon the ground, also drew a knife, upon which knife the deceased, in a hurry to do the act, fell, and was killed; this was held not homicide *se defendendo*, but not felony at all, the death having followed from the motion of the deceased himself. This distinction was material to the defendant; for notwithstanding *se defendendo* was a killing under an absolute necessity in defence of one's self or property, it was still homicide, and the goods were forfeited upon conviction. So was it held at common law; and as the statute of Gloucester (a) had only ordained that the convict should have a charter of pardon, the forfeiture remained as before (b).

In respect of homicide when committed in defence of a man's property, it was held, that where a thief assaulted a man, and pursued him, if he killed the thief, the killer should go quit (c). Again, where it was proved that the deceased and another came to the house of the defendant with a design to burn it, and the defendant, being then at home, shot an arrow, and killed the deceased; this was adjudged not to be felony. It was at the same time said, that where a thief had robbed and killed a merchant, and the merchant's servant came suddenly upon the thief, and killed him, it was not felony (d). It will be seen presently, that such killing was sometimes esteemed *justifiable*.

Most of the foregoing were cases of homicide which Bracton calls *ex necessitate*. We shall now consider such as he denominates *ex justitiâ*. This was, when the killing happened in the execution of lawful process. And here the defendant, instead of pleading not guilty, might state the special matter in the way of a justification; and if it was proved true, he went quit, without a charter of pardon. In such case of justification, the jury were charged to find if the thief, against whom the process was directed,

(a) Vid. ant. vol. II. 153. (b) 44 Ed. III. 44. 21 Ed. III. 17.

(c) 26 Ass. 32. (d) 26 Ass. 23.

could have been otherwise taken; so strictly did they require, even in *justifiable* homicide, that a plain *necessity* should be made out to warrant the killing. It was at the same time said, that a man might in many cases *justify* a killing; as, where thieves came to rob, or burglariously to break a house, they might safely be killed, if they could not be otherwise taken: the same of a gaoler, if he had a weapon in his hand, and was attacked by his prisoners (a): so that it should seem, the killing a thief or a burglar, if he could not otherwise be taken, was not homicide *se defendendo*, but *justifiable*. In reading our old writers on criminal law, it should be remembered, that they made a distinction between homicide *se defendendo* from necessity, and *se defendendo* justifiable; the former being felony, the latter none at all.

There was no allowance in our old criminal law for the infirmities and passions of men's minds. A killing, if in a quarrel or sudden affray, was equally felonious with any deliberate act of killing: it was so in Bracton's time (b), and so it still continued: therefore, where two men were fighting, and another interposing to part them was killed by one of them; to adjudge this felony, was perfectly consonant to the notions of law that had long prevailed (c). In Bracton's time it was held, that to procure an abortion, after the fœtus was formed and animated, was homicide: the courts now began to think otherwise. A man beat a woman big with two children, of which one then died; the other was born alive, and baptised, but died two days after of the injury it had received; and all this was stated in an indictment: but it was held by the court not to be felony (d). It was the governing opinion all through this reign, that to kill a child *in ventre sa mere* was not felony; the reason given for it being, that such a child, as it never

(a) 22 Ass. 55.

(b) Vid. ant. vol. II. 10.

(c) 22 Ass. 71,

(d) 3 Ass. 2.

was *in rerum naturâ* (a), could not properly be said to be *occisus*; though the same reason would not apply to one that was born, and died of the injury it had received *in ventre*, as in the foregoing instance.

The practice was, if a jury acquitted a man of homicide, to direct them to find *who* was guilty of the killing (b), in order that so heinous a crime might not go unpunished. We find where a jury had acquitted a man who was indicted for the death of another, and they were directed to say *who* killed the deceased, they said that he was in a passion, and fell upon his knife, and so killed himself (c). It was common to indict a person *de morte ignoti*, which was held sufficient; but in an appeal, the name of the deceased was always to be mentioned; the latter being a suit that belonged only to the relations, who must of necessity know him; the former being a presentment by the jurors for the king, without any knowledge of the deceased (d). There is an opinion, that persons outlawed for felony, as they were *capita lupina*, might be killed by any-body; though Bracton lays it down otherwise (e); and says, that even where a sentence of law was not executed in due order, it was an offence. Very early in this reign we find a person arraigned for killing an outlaw for felony (f). In the 27th year, in an appeal of death by a woman, the husband's outlawry for felony was pleaded, and, though over-ruled, a case was mentioned where it had been allowed (g). It is probable, that the slayers of such unhappy objects went without punishment, rather from some peculiarity in the circumstances of the prosecutions then in use, than from any principle of law authorising such barbarity. The heir of a person so outlawed could not have an appeal, because of the corruption of blood; and therefore, till the time of

(a) 22 Ass. 94. (b) 21 Ed. III. 17. (c) 37 Ass. 13. (d) 1 Ass. 7. 22 Ass. 94.

(e) Vid. ant. vol. II. 20. (f) 2 Ass. 3. (g) 27 Ass. 41.

Henry III. when the proceeding *per famam patriæ* became more common, there was no regular method of bringing such offenders to justice. But now, when indictments were preferred almost as frequently as appeals, it is no wonder that those who committed violence on such persons, were brought to punishment.

Larceny. The crime of *furtum*, or *larceny*, as it was now commonly called, began to be more minutely explained.

The new learning upon this head related either to the things taken, or the mode and circumstances under which they were taken. A forester was indicted *quodd felonice succidit et asportavit arbores, &c.* upon which indictment the justices refused to arraign him, because the trees were annexed to the soil, and so not *moveables corporeal*, as they were required to be by *The Mirror* (a); and therefore felony could not be committed of them even by a stranger, much less by the forester, who had the custody of them. As to the trees being annexed to the freehold, it was suggested, that it would be different, if they had been cut by the lord, and afterwards taken away by some one (b). It was held, that doves, fish, and other animals, being *feræ naturæ*, were not such things as a man should suffer death for taking them; *nisi* (says the book) *fuerunt felonice furata extra domum vel mansionem* (c). A person who lived a servant in a house got up in the night, took some things out of a chamber into the hall, with intent to take them away; and in going to the stable for his horse, was stopped by the ostler: this was adjudged a sufficient *taking* to make it a larceny (d). Taking away a woman with the goods of her husband upon her, was held a felony of the goods, if it was against the woman's will; though it should seem to be otherwise, if she consented to the going away (e). There appears to have

(a) Vid. ant. vol. II. 351. (b) 12 Ass. 32. (c) 22 Ass. 95. (d) 27 Ass. 39.

(e) 13 Ass. 6.

been a difference of opinion about the offence of receiving stolen goods. A man was appealed by a provor, *quòd receptavit latrocinium sciens de feloniam illam, &c.* and the justices would not put him to answer; though *Shard* said, that *Scrope* used to punish such offenders (a). It was laid down, that *theftbote* was not when a man took his own goods from a thief, but only when he accepted the thief's goods, in order to favour and screen him (b).

We have seen in the reign of Edward I. (c) there was a difference of opinion as to the sum which constituted grand or petty larceny. It was said by *Thorpe*, in the 22d year of the king, that a man should be hanged if he stole 12d.; to which the Reporter adds, *Dixit tamen, quòd laici dicunt QUE NON nisi summa excedat 12d.* (d). That the vulgar opinion differed from that of lawyers, appears plainly from the verdicts of juries, who, when they found a man guilty of the fact, and yet wished to make it petty larceny, in order to make sure of being right, would find the goods to be worth only *ten-pence* (e). The better opinion seemed not to be that of *Thorpe*, but that which he attributed to the lay gents (f). A conviction of petit larceny produced a forfeiture of goods (g); and the punishment was, to be sent to prison *d'aver penance* (h); which probably meant no more than custody and confinement.

Burgessours, as they were called by Britton (i), Burglary. or *burglars*, as they were now called, are in this reign described somewhat differently than they had been by that author. He seems to include the circumstance of stealing as a requisite to constitute the crime; but in the 22d year of this king they are described as those "who feloniously in

(a) 27 Ass. 69. (b) 42 Ass. 5. (c) Vid. ant. vol. II. 274, 275.
 (d) 22 Ass. 39. (e) 18 Ass. 1. (f) Vid. ant. vol. II. 275. (g) Bro.
 Cor. 219. (h) 18 Ass. 1. (i) Vid. ant. vol. II. 274.

“time of peace break houses, churches, walls, or doors; “for which burglary” (says the book) “a man would be “hanged, even though he took nothing (a). Thus the offence consisted in the violence done to a man’s house, and not to his other property, for it carried in it no idea of stealing. Again, *robbery* consisted principally in the violence done to a man’s person; for if only a penny was taken, yet the robber would nevertheless be hanged (b).

Respecting all these offences, it must be observed, that the intent was considered as equally criminal with the fact; and persons were often executed as offenders, who, in the language of the present time, would be thought to have actually committed no offence. It was said by *Shard*, in the 27th year of the king, that a person taken *deprædando vel burgulando* should be hanged, though he did not put in execution his design: the same of a man who assaulted with intent to rob, though he took nothing (c). This notion was of very ancient date, and prevailed all through this reign. When common offenders were pursued with such violent presumptions, the severity with which state-crimes were prosecuted cannot be wondered at. The statute of treasons seems only to have put treasons upon the same foot with felonies; for by that statute such delinquents were not to be convicted, unless they had signified their intent by some manifest *overt* act, like that of *deprædando* or *burgulando* in a felon.

If the law punished those who only attempted to commit an offence, it is not to be wondered that those who were accomplices to the commission of the fact, were subject to the animadversion of the law. Little is said on the subject of *principal and accessory* by Bracton. Some decisions in this reign give an insight into the distinct marks of these two degrees of offenders. If a man received a felon,

(a) 22 Ass. 95.

(b) 22 Ass. 39.

(c) 27 Ass. 38.

so as to aid or favour him in his felony, he became an accessory ; but if he aided him *per bon parol, ou suist*, or sent letters for his deliverance, this did not make him an accessory (a). The idea of accessory was carried very far ; for if an accessory was received by any one, such receiver became accessory to the accessory, and might be appealed as such (b). A man might be tried as accessory after he had been acquitted as principal ; for where a person on a plea of not guilty was acquitted, he was afterwards indicted for receiving the man who had committed that same felony, after he had been outlawed for it ; and he was arraigned, and obliged to plead to it (c) : for it was said, his acquittal could have no effect to discharge him of an offence which he had committed since. It was a general rule, that an accessory should not be put to answer in any case of felony, till the principal was attainted ; and this was the practice all through this reign (d). Every precaution was used to prevent the accessory being tried for an offence, before it was proved that the principal had really committed it, to avoid the absurdity of making a man accessory to a crime which did not exist, or at least had not been proved on the person who committed it. For the same reason, where a man claimed his clergy, and was found guilty by an inquest of office, yet the accessory was not arraigned, because there was a possibility that the principal might make his purgation before the ordinary (e) ; and should the accessory have been found guilty and hanged, this incongruity would bring a scandal on the justice of the kingdom.

If the principal was found guilty of justifiable homicide *se defendendo*, and had his charter of pardon, as there was no felony proved upon the principal, the accessory went quit (f). Again, where the principal and accessory were

(a) 26 Ass. 47. (b) 26 Ass. 52. (c) 27 Ass. 10. (d) 44 Ed. III. 7.

(e) 5 Ass. 5. 18 Ass. 13. 26 Ass. 27. (f) 15 Ass. 7.

both indicted, it was held a good plea for the accessory to say, that the principal was dead; and if the principal was hanged for any other felony, the accessory was to be discharged (*a*). Thus, it became usual in all cases, not excepting homicide itself, where the principal was not yet attainted, to let the accessory to mainprise (*b*).

By the old law, judgment of felony did not use to be passed against an infant within age; but we have before mentioned the case of a girl of thirteen years who was burnt for killing her mistress: this was in the 12th of this king: they seemed however to think, that the propriety of executing judgment of death on a child, was to depend on the appearance of capacity and understanding, [which would be different in different persons. If a child did any thing which shewed he was sensible of having acted wrong, they pronounced, that *malitia supplet ætatem*, and proceeded as with an adult (*c*). Married women were in Bracton's time considered as *in potestate viri*, and so privileged in cases of felony; but that was with a distinction which has not been observed so much as the good sense of it deserved (*d*). A married woman, in this reign, would have confessed the felony, and that she did it by the command of her husband; but the judge would not take the confession: however, he directed the jury to find, that she did it by coercion of her husband, and upon that she went quit (*e*). A woman might plead her pregnancy to respite her execution; but this would not be allowed a second time.

The offence of conspiracy, the legal consideration of which had become a great object since the reign of Edward I. (*f*) might be prosecuted either at the suit of the king or of the party; and the judgment in those two cases was

(*a*) 22 Ass. 40. (*b*) 40 Ass. 8. (*c*) 12 Ass. 30. (*d*) Vid. ant. vol. II. 42, 43. (*e*) 27 Ass. 40. (*f*) Vid. ant. vol. II. 239, 242.

different. In the latter, it was for a recovery of the damage sustained by the plaintiff, and for imprisonment of the defendant : in the former, the offender underwent a similar pain with attainted jurors ; namely, he was to lose his *liberam legem*, to be no more put on juries or assises, nor to be a witness ; and, if he had any business in the king's court, he was always to make an attorney to sue for him ; he was not to come within twelve miles of the king's residence ; his lands and chattels were to be seised into the king's hands, his houses to be destroyed, his wife and children turned out, his trees cut down, and his body imprisoned (a). By what authority the *villainous judgment* (for so this was called) was made the punishment in cases of conspiracy, does not appear ; it was not prescribed by the statutes of Edward I. which gave the writ of conspiracy. The affinity which this offence bore to the false swearing of jurors (being often the cause and motive to it) might naturally dictate a like mode of punishing those who were guilty of it.

We have seen that the statute of Gloucester (b) Appeal. had taken away the necessity of making fresh suit in prosecuting an appeal, provided the party commenced it within a year after the fact. The method of prosecuting an appeal in this reign was as follows : The prosecutor was to come in full county within a year and day after the fact, and find two sufficient pledges of prosecution ; the coroner was then to enter his appeal on the roll, and forthwith command the bailiff of the place to have the body of the appellee at the next county ; and if the bailiff testified at two counties, that he was not to be found, then he was to be demanded from county to county till he was outlawed. Should the plaintiff make any default, the *exigent* was to cease, as in Bracton's time, till

(a) 46 Ass. 11.

(b) Vid. ant. vol. II. 154.

the coming of the justices in eyre, and the plaintiff lost his suit (*a*). It was held, very early in this reign, that appeals would lie before justices of gaol delivery. It was agreed, that an appeal would lie in the king's bench at Westminster of a robbery in Yorkshire, on the idea, that the justices there were the sovereign coroners of the land; and therefore they might do such acts as the sheriffs and coroners did with relation to appeals in their respective counties (*b*). Appeals, like other records, might be removed from before the coroners into the king's bench.

The stat. Westm. 2d, which gave imprisonment and damages in case of false appeals, occasioned some discussion (*c*). It was held, that though the defendant was acquitted, yet there should be no inquiry of the damages or abettors, if an indictment had been preferred; as thereby a fair presumption of guilt was raised, sufficient to take away all charge of malice in the plaintiff. But the appeal and indictment must appear to be precisely for the same offence; for if they did not agree, as where one was against the party as principal, the other as accessory, there the defendant might have his damages: the same if the indictment was brought after the appeal (*d*). If the jury found it homicide *se defendendo*, there would be no inquiry of damages or of the abettors, because the jury had thereby pronounced there was no malice (*e*).

The object in an appeal of robbery, or larceny, was the restitution of the thing stolen, which could not be obtained by conviction upon an indictment. In order to do justice to the person who had been spoiled, it was held, that though the defendant had his clergy, yet the plaintiff should be intitled to a restitution (*f*). A difficulty arose

(*a*) 22 Ass. 97.

(*b*) 17 Ass. 5.

(*c*) Vid. ant. vol. I. 210.

(*d*) 40 Ass. 18. 22 Ass. 39. 40 Ed. III. 42.
Ed. III. 44.

(*e*) 22 Ass. 77. (*f*) 44

where a man was appealed by three different persons, and, being convicted at the suit of one, was hanged: it was said, the others should have no restitution, but that the goods should be all forfeit. Yet one of the justices directed an inquest to try whether the thief was taken by the other persons, and whether the goods were theirs; and both these issues being found in the affirmative, they had restitution, as being no ways in default (*a*). The same method was taken if the defendant stood mute upon an indictment, and an appeal was then depending (*b*): in like manner where the defendant, after pleading not guilty, fled to sanctuary (*c*) and abjured.

There was commonly both an indictment and an appeal depending for the same fact; and the appeal would sometimes, on default of the appellor, be arraigned at the suit of the king. A woman appealed a man, and he was acquitted; the offender and several others were afterwards indicted of the same fact; upon which she brought a fresh appeal: but it was held, that when she had brought one appeal, and the defendant was acquitted by nonsuit after appearance, or in any other way, she could not have a second appeal against any others: so they were arraigned at the king's suit (*d*). If an appeal was null or defective in form, and so the plaintiff could not prosecute it, neither could it be arraigned at the suit of the king (*e*). An acquittal upon an indictment within a year after the fact, was thought to be no bar to an appeal (*f*); the plaintiff being intitled, it should seem, to bring his appeal at any time within the year. The higher suit was the appeal, which was therefore more favoured than the indictment. An heir brought an appeal after an indictment, and the declaration agreed neither in year, day, nor weapon, with the in-

(*a*) 44 Ed. III. 44. (*b*) 22 Ass. 16. (*c*) 26 Ass. 52. (*d*) 47 Ed. III. 16.

(*e*) 27 Ass. 25. 13 Ass. 11. (*f*) 17 Ass. 1.

dictment; afterwards the parties compromised the matter, and the plaintiff was nonsuit after declaration: but notwithstanding this, the defendant was arraigned upon the declaration, and not upon the indictment, and a *cesset processus* was entered on the indictment (a). In an appeal by an infant, the *parol* used to demur; and if the party was arraigned on the indictment and pleaded not guilty, he would be let to mainprise till the infant was of age to prosecute the appeal (b). It has been before remarked, that the attainder of the ancestor was held a good plea to bar the heir of an appeal, though it would not bar the widow; the former being an action which accrued by reason of blood; the latter not (c).

It had long been agreed, that, should a person be struck in one county and die in another, an appeal might be brought in the county where he died: and if the defendant was arraigned at the suit of the king, a jury should be summoned out of both counties (d). But where an appeal was brought against two, one for killing in one county, and the other for receiving the offender in another, it was agreed that an appeal could not be laid against a principal in one county, and an accessory in another, unless where it was in one vill that extended into two counties; the former cases, however, were admitted to be law (e).

Appeals by provors were still a common mode of prosecution, and many decisions happened which shew the nature of this proceeding. It was agreed, that none but such as were in prison for felony could become provors (f). If a provor received the king's pardon after the appeal, the appellees went quit; but should a provor disavow his appeal, or die, between the joining battel, or issue, and the

(a) 4 Ed. III. 10.

(b) 32 Ass. 8.

(c) 2 Ass. 3. Vid. ant. 121.

(d) Bro. App. 149. 41 Ed. III. 6. 19.

(e) 45 Ass. 9.

(f) 21 Ed. III.

18. Vid. ant. vol. II. 43.

trial, the appellee was to be arraigned at the suit of the king; so that in this respect it was like a common appeal or an indictment (*a*). The following cases may give some idea of the effect and consequences of this mode of prosecution. A provor was hanged, and the appellee was not arraigned at the suit of the king (*b*). A provor was nonsuited, and then offered to plead that he was taken out of sanctuary; but this plea was not allowed after he had confessed the felony by becoming a provor, and he was adjudged to be hanged (*c*). A man after pleading not guilty was not permitted to become a provor (*d*). A provor was hanged for appealing persons out of the kingdom, who being out of the reach of the law could not be attainted (*e*): so strictly were these persons held to the performance of the terms on which they were to have their lives. A provor disavowed his appeal, on pretence that he made it by duress; the coroner denied this; and the record of the coroner was judged sufficient evidence of his being voluntary in the appeal, and he was accordingly hanged (*f*). Where a defendant in an appeal of robbery wanted to approve the appellor, and demanded a coroner for that purpose, it was held, that he could not make an appeal of any other than the goods in question (*g*). It was a good plea against a provor to say he had abjured the realm, and so was out of the common law; and if it was found to be so by the rolls of the coroners, he would be hanged, and the appellee go quit (*h*): outlawry was likewise a good plea against a provor (*i*).

The proceeding by presentment and indictment became more common in cases of felony, Indictments. than it had been in any former period. As indictments were,

(*a*) 47 Ed. III. 5. (*b*) 21 Ed. III. 17. (*c*) Ibid. (*d*) 21 Ed. III. 18.
 (*e*) 1 Ass. 2. (*f*) 12 Ass. 29. (*g*) 40 Ass. 39. (*h*) 11 Ass. 27.
 (*i*) 21 Ed. III. 17.

by a statute of Edward I. directed to be in writing and indented (a), they, after that, were framed with deliberation and in form. Wherever an indictment was presented for a matter which by the old law might have been prosecuted by appeal, it was natural to adopt the words and phrase of such appeals; so that an indictment differed very little from an appeal of the same offence, except in the introductory part: *Juratores pro domino rege super sacramentum suum presentant quòd, &c.*

The commissions of *oyer & terminer*, besides enumerating specific offences, authorized the commissioners to hear all "damages, grievances, extortions, and deceits," done to the king and his people. Owing to this, an idea had prevailed, of the great extent of the inquisitorial authority with which the presentors before such commissioners were invested; and many misprisions and irregularities were attempted to be prosecuted in this way, which were perhaps not before considered as criminal, but were thought to be fitter objects of a civil action.

The following are experiments in this liberal sort of penal jurisprudence. An indictment against a person for taking 20s. of such a one when he was collector of the taxes, was held good as for extortion; but an indictment against a man as "a common misfeasor" was held ill for the uncertainty: the same of a "common thief;" as a man should be brought (it was said) to answer not for every act of his life, but for some particular fact (b). An indictment for concealing the custom, in order thereby to get advantage of the market, and to enhance the price of merchandise, was held good (c). But where some justices of *oyer & terminer* were indicted for changing some presentments, by entering on the roll as felonies what were only trespasses, they demurred to the indictment (d). An

(a) Vid. ant. vol. II. 211. 459.

(b) 22 Ass. 73.

(c) 43 Ass. 38.

(d) 27 Ass. 18.

indictment, *quodd cepit et asportavit* certain charters concerning land was held ill, as not being of a criminal nature (*a*). An indictment for voluntarily suffering a felon to escape (*b*), and against an indictor *felonicè* for discovering the king's counsel, were held good: the latter, which seems to be a singular case of felony, was said by *Shard* to be treason (*c*).

In the time of Bracton the presentment of offences was, by a jury of twelve, returned for every hundred in the county (*d*). But that practice had now received some small alteration; for towards the close of this reign we find, at a commission of oyer and terminer, that besides the return of an inquest for every hundred by the bailiff, the sheriff likewise returned a pannel of knights, which, says the book, were *le graunde inquest*. The inquests for the hundreds still made their presentments, as in Bracton's time (*e*); and if they presented, they likewise, no doubt, found indictments; but these were confined to their different hundreds. The grand inquest probably was to inquire at large for every hundred in the county; and the hundredors became jurors in inquests *de bono et malo*, or *ex officio*, when called upon; and if a commission of assise and *nisi prius* were sitting, they filled the place of jurors occasionally in assises and juries in civil causes. When the practice began of returning a grand inquest to inquire for the whole body of the county, the business of the hundred-inquest must naturally decline, till at length the whole burthen of presenting and finding indictments devolved upon the grand inquest, and the hundredors continued to be summoned merely for trying issues.

If there remains any doubt, whether prisoners were subject to a sort of penance before the stat. Westm. 1st. it seems

(*a*) 30 Ass. 27. (*b*) 27 Ass. 62. (*c*) 27 Ass. 63. (*d*) Vid.
ant. vol. II. 3. (*e*) 42 Ass. 5.

to be wholly removed by some cases reported in this reign ;
 Of penance. where this penance was inflicted without the
 least authority from that statute (a). In the 21st
 year, a man was appealed of robbery, and was taken at the
 plaintiff's suit with the manor : he then stood mute, and an
 inquest *ex officio*, as was usual, being impannelled to try
 whether he could speak, and they finding that he was mute
 of malice, it was adjudged that he should be hanged ; and
 it was at the same time said, that had it been at the suit of
 the king, he would have been put to his *penance*, there
 being this difference between an appeal and an indict-
 ment (b). But this distinction did not hold universally, at
 least as to the appeal ; for in the 43d year, when a woman
 appealed a man of the death of her husband, and he stood
 mute, and it was found by an inquest *ex officio*, that he had
 spoken that same day, he was ordered to the *penance* (c).
 It is probable that the latter was the most usual course,
 and that the robber in the former case was hanged, merely
 because he was found with the manor. Conformably with
 this idea, we find, that in the 26th year, a man, after he
 had abjured the realm, was arraigned, and standing mute,
 was put to his penance ; but it was at the same time said,
 that a provor standing mute should be hanged (d). The
 confession of the provor, and the being taken with the
 manor, were considered as convictions in themselves, upon
 which it might be safe to execute an obstinate offender ;
 though it would be rigorous indeed to presume guilt in
 every one who stood maliciously mute.

Trial by battel It was endeavoured by all means to avoid
 and jury. the trial by *battel*, and to encourage that by
jury (e). Thus, in an appeal for breaking the king's
 prison, the battel was not allowed. If the defendant
 was taken at the suit of the appellor, and had es-
 caped, he was ousted of his battel, that being a sort

(a) Vid. ant. vol. II. 117.

(b) 27 Ed. III. 18.

(c) 43 Ass. 30.

(d) 26 Ass. 13.

(e) Vid. ant. vol. II. 272.

of prison-breaking (*a*); the same where a defendant was taken with the manor (*b*). The trial by jury, or *per pais*, in civil causes, and the manner in which it was now ordered, has been already mentioned: this trial, in criminal cases, preserved an analogy with it, being distinguished by very few peculiarities. It was no longer the custom, as in Bracton's time (*c*), for the defendant to put himself upon a particular *pais* or hundred, or for the judge to direct the fact to be tried by one *pais* in preference to another. The prisoner put himself upon the country generally, which implied a jury of the county where the fact arose; but so much of the old practice continued, that the *pais* were to consist of some hundredors belonging to the hundred where the vill in which the fact was said to be done was situated. Thus, though the idea of the jury coming from the vicinage, and being therefore acquainted with the fact they were to testify, was, in some measure, given up, this legal privity was, however, still preserved in construction of law; for though the people of one hundred were permitted to try a fact committed in another, the people of one county were not supposed to know, nor were suffered to try, a fact arising in another. Therefore, where a man was taken in the county of *S.* with goods that he had stolen in the county of *N.* it was said, that the justices in the county of *S.* might put him to answer; and if he pleaded not guilty, they might send for a *pais* in the county of *N.* no jurors in the county of *S.* being competent to the trial of a foreign fact (*d*).

We have seen a statute made in this reign, ordaining, that no indictor should be put on the deliverance of the prisoner whom he had joined in indicting (*e*); such therefore was a good challenge to a juror. In order to enable the defendant to make such challenge, it was usual to put the

(*a*) 1 Ass. 3. 6.

(*b*) Vid. ant. vol. II. 272.

(*c*) 4 Ass. 1.

(*d*) 26 Ass. 32.

(*e*) Vid. ant. vol. II. 268.

indictors' names to the indictment; and it was a good exception to an indictment, if it was without them (*a*). A doubt might be raised who were meant by the indictors; and it seems, that it signified not only the jurors who presented, but those also who were sworn to inform them, or who, in the modern language of the law, preferred the indictment; and in that sense was the word *indictor* taken at this time (*b*). If so, the practice now was to challenge *them*, as well as the presentors; and it was probably their names, as well as those of the presentors, that were required to be on the bill of indictment (*c*).

The courts seem to have carried the construction of the above statute further than the bare letter of it warranted; for where one of the indictors in trespass got himself to be made foreman of the jury to try the issue in an action brought for the same trespass, he was committed to the Marshalsea, and paid a heavy fine; for (they said) he ought to have challenged himself (*d*). What other causes of challenge were allowed by the court, have been shewn before, in speaking of juries in civil actions; but to prevent defendants in criminal cases creating delay, and avoiding a trial by repeated challenges, it was laid down as a rule, that where a defendant challenged generally three inquests without cause, he was to be considered as refusing the law; but if he shewed sufficient cause of his challenge, he might challenge even more (*e*). If a defendant did not appear to take his trial, process of *capias* issued against him; and nothing else could be done; for it

(*a*) 44 Ed. III. 43. The *seals* of the indictors were, by statute, required to be annexed to indictments. Vid. ant. 132.

(*b*) 27 Ass. 12.

(*c*) Though the practice of annexing the presentors' names is out of use, the names of the prosecutor and witnesses are still indorsed; but the point of law which made either of them necessary has been long obsolete.

(*d*) 40 Ass. 10. (*e*) 17 Ass. 6.

was a rule, that an inquest should never be taken by default in criminal cases.

Sanctuary, abjuration, and clergy, had undergone very little alteration. The law upon these heads stood at present as follows: If a person had been drawn violently from the place where he had taken sanctuary, he might plead this to an appeal or indictment. Where a provor was nonsuit in his appeal, and then pleaded that he was forcibly taken from such a church, where he had fled for sanctuary, and prayed to be restored; it was adjudged that, as he had omitted to plead that at first, he should be hanged upon the nonsuit (a). A person delivered to the sheriff to be executed, if he escaped to a church, was not allowed the privilege of sanctuary (b). Of all these places of sanctuary (and they were very numerous), the principal was one at Westminster, which belonged to the abbot of that religious house. This was enjoyed under a grant from one of our kings. It was endeavoured in this reign to extend the privilege of this place to debtors and accomptants, and to other cases besides felony; but upon exhibiting the charter granting the privilege of sanctuary to the abbots, they appeared to claim under the following words: *Quòd quisquis fugitivus de quolibet loco pro quâcunq; causâ cujuscunq; conditionis fuerit, si ipse SANCTUM LOCUM Westmonasterii fugiens intravit, membrorum et vitæ impunitatem consequatur*; and it was decided by all the justices, notwithstanding the seemingly general exemption given by some of those words, that the sanctuary was confined to felons (c). The resort of felons to this place, being in the metropolis of the kingdom, must have been very great, and productive of great disorders. The abbot of Westminster was, besides, the ordinary of the king's bench, and had a prison (which in later times was the Gate-house) where he kept those clerks that were delivered to him from the Marshalsea (d).

(a) 21 Ed. III. 17.

(b) 27 Ass. 54.

(c) 29 Ass. 34.

(d) 21 Ass. 12.

The manner of delivering clerks to the ordinary, if clergy was claimed upon the arraignment, was the same as in Britton's time (a). A jury used to be impannelled *ex officio* to try the fact of clergy; and this was the practice in the last reign. Clergy was allowed to a defendant in appeal as well as on an indictment, and a provor might have his clergy (b). It seems, that a clerk had not his privilege if he was not demanded, or was disowned, by the ordinary. A clerk was found guilty of felony, and shewed his clerkship by reading, but nobody challenged him; however, he was not hanged, but sent to prison: and this was the usual course, as it should seem, where the party was found guilty by the inquest *ex officio* only. For where the same clerk, chusing to risk a trial rather than suffer indefinite imprisonment, renounced his clergy, pleaded to the country *de bono et malo*, and was found guilty, but again claimed his clergy, and no ordinary appeared to challenge him, he was hanged (c). Again, where a man was found guilty, and, upon his claiming his clergy, was refused by the ordinary because he had broke the archbishop's prison, he was hanged, by the advice of all the justices (d). A clerk was attainted of breaking the bishop's prison, and claimed his clergy; but it was answered by the judge, *frustra legis auxilium invocat, qui in legem committit*. He said, if the bishop would claim him, he might have his privilege; but the ordinary disclaimed him, and he was hanged (e). As there was this distinction between a conviction by the jury *ex officio*, and that *de bono et malo*, it was adviseable for a clerk to claim his clergy on the arraignment, lest he should not be demanded by the ordinary after conviction (f).

(a) Vid. ant. vol. II. 272.

(b) 43 Ed. III. 42. Bro. Clerg. 26.

(c) 12 Ass. 15.

(d) 12 Ass. 39.

(e) 27 Ass. 42.

(f) Brooke, not observing the difference between a conviction by these two juries, concludes, that, as some such disclaimed clerks were hanged, and some not, it rested wholly on the discretion of the justices. Bro. Clerg. 9.

When the privilege of clergy thus depended upon the will and pleasure of the ordinary, it was reasonable enough to allow it in the offence of sacrilege, the church being at liberty to pardon offences against itself. It was therefore held, that stealing a chalice did not preclude a man from his clergy, if he was claimed by the ordinary (a). If a clerk had acknowledged that he was not a clerk, yet he would afterwards be permitted to read, and shew that he was one. Reading seems to have been the grand evidence of clergy: however, we find *Shard* adopting the saying, *quodd litteratura non facit clericum nisi habet sacram tonsuram*; and that an ordinary challenging one who was not a clerk should lose his temporalities (b). A priest who had abjured, returned without the king's licence; and being arraigned for this offence, and pleading his clergy, he was sent to prison, and it was said he would have been hanged had he been a layman (c).

Another plea which prevented the going on to trial, was that of *autre foit acquit* of the same felony; upon which the defendant was expected to produce the record of acquittal (d). It seems not to have been settled whether *autre foit convict*, or *attaint* (for no distinction was yet made between (e) them), should be a plea to avoid a second trial. Where a man was appealed by three appeals of robbery, and was convicted on one, the justices had great doubt whether he should be put to answer to the rest, or hanged upon that conviction. This doubt was entertained through tenderness to the other appellors, who could not have restitution without a conviction; but upon consideration, the man was hanged without being arraigned upon the other appeals, and the parties had restitution of their goods *without* a conviction (f). When this mode was struck out, it

(a) 26 Ass. 27.

(b) 26 Ass. 19.

(c) 1 Ass. 4.

(d) 26 Ass. 15.

(e) Vid. ant. vol. II.

(f) 44 Ed. III. 44. b.

probably soon became settled, that *autre foit attain* should be a good plea to an indictment or appeal.

Of forfeiture. The law of forfeiture was strictly enforced in these times, and the occasions of exercising it seem to have been as eagerly caught at. It was held, that where a defendant claimed his clergy after verdict of conviction, the judgment was *suspendatur per collum*, and by virtue of this he forfeited his goods. This was another reason for praying clergy before verdict; for then, there being no pretence for such a judgment, there was not properly a forfeiture (a); though there are not wanting instances where the forfeiture was enforced even in such cases (b). It should seem that no interval was left between the verdict and judgment, but that it was usual to enter it immediately; and therefore, in all the old books, the *conviction* and *attainder* are spoken of without any distinction, as if they were the same thing. The forfeiture in the time of Bracton seems to have been more general than it was now held to be; they then forfeited *all* rights of action (c). The law now was, that though debts by obligation were forfeit, yet simple contract debts were not; the reason for which was, as has been before observed, that the defendant, who might wage his law in such case, would be deprived of that privilege when sued by the king (d). The goods were forfeited by the issue of the *exigent*, though the party might be afterwards acquitted of the felony (e). One who fled to a church for felony forfeited his goods, as in other cases of flight, with the profits of his lands; and if he abjured, he forfeited his lands also (f). It was said, that land purchased after a felony committed, was forfeited equally with that enjoyed before (g). In case of a feoffment to baron and feme in fee, if the baron committed felony, the land was not forfeited, but survived intire to the feme,

(a) 40 Ed. III. 42. (b) Fitz. Ass. 116. (c) Vid. ant. vol. II. 21.
 (d) 50 Ass. 1. (e) 22 Ass. 21. & passim. (f) Bro. Forf. 121. (g) 48
 Ed. III. 2.

on the idea that the feme could take no moiety with her husband (a).

Where a person, being issue in tail, was outlawed for felony during the life of the tenant, and had his pardon, he might enter, after his ancestor's death, as heir in tail, though it would be otherwise with the heir in fee-simple; but it was thought, that should the ancestor die before the pardon, the heir in tail could not enter, because the king would be intitled to the profits during the life of the outlaw (b). The striking of a juror for giving a verdict against a man in the hall at Westminster, was an offence that was punished with loss of lands and goods, besides amputation of the right hand (c). Not to bring this calamity of forfeiture on a man before he was proved guilty, the law still preserved the humanity it professed in Bracton's time (d). The sheriff was not to seize and carry away the goods of a felon immediately upon his being indicted, but to take surety of the party that they should not be withdrawn; and if he would not give surety, they were to be put into the hands of the neighbours to be kept till the event of the prosecution was known (e).

The dominion of laws and of a settled government seems fully to have established itself under the great power and popularity of this prince. The law was a protection to the property and lives of the people: and there generally appeared in the reigning power an anxiety to preserve it unviolated. However, it cannot be denied that this king, as well as his predecessors, discovered a strong attachment to the old prerogatives; and there are not wanting instances wherein he acted illegally, and infringed the undoubted rights of the people.

The many confirmations of *Magna Charta*, and the statutes made to prohibit protections, are strong proofs of

(a) 4 Ass. 4. (b) 29 Ass. 61. (c) 41 Ass. 25. (d) Vid. ant. vol. II. 24.
(e) 43 Ed. III. 24.

the practices which called for such parliamentary interposition. All the ancient prerogatives of the crown were, at one time or other, exercised by this king. The levying of money without assent of parliament; the dispensing power; an oblique confirmation of that power by statute 1 Ed. III. c. 1; monopolies, loans, imprisoning members of the house of commons for freedom of speech, extensions of the forests, renewal of the commission of Trailbaston (*a*), pressing men and ships, levying arbitrary fines, the council obliging people to find recruits (*b*); all these extraordinary exertions of power were kept on foot by Edward the Third.

The regard paid by this prince to the sanction of the legislature is shewn in one strong instance: Having found it necessary to consent to an act of parliament by which the controul over his great officers had been taken from him, and conferred on the parliament; he issued an edict, in which he affirms, that he *only dissembled* when he seemed to ratify that act, but that he had never in his own breast given his assent to it. To prevent, therefore, the inconveniences which he thought he foresaw would follow from that law, he, with the advice of his council, and *some* earls and barons, *thereby abrogated* and annulled it. The next parliament, so far from taking any notice of this extraordinary proclamation, consented to a regular repeal of the statute (*c*).

When the parliament was thus contemned in its legislative capacity, the king could have no trouble in managing its judicial decisions according to the exigency of his own occasions.

The earl of Kent was attainted by parliament, without any formality of enquiry. Roger Mortimer, who had procured that attainder, was himself accused before parliament,

(*a*) 2 Ed. III. 41.
Parl. Hist. vol. I. 264.

(*b*) Hum. vol. II. 490.

(*c*) Hum. vol. II. 414.

and condemned by the lords upon the mere exhibition of the articles, "without any further enquiry, because every thing therein contained was notorious, and known to themselves (a)." About twenty years afterwards this attainder was reversed in favour of his son; and the reason there given, was the illegality of the proceedings. It is observed, that the principles of law and justice in these times were established, not in such a degree as to prevent an iniquitous sentence against a devoted person, but sufficient to serve as a reason for its reversal on a change of things in favour of himself or his party (b).

The next objects of enquiry are those monuments of legal antiquity which contribute to furnish information through the reign of this king. These are the Statutes, Parliament-rolls, Year-books, and some small law tracts.

The statutes from the beginning of this reign are called *Nova Statuta*, as contra-distinguished from those which preceded. It seems that the commons began now to take some partial share in the legislature, for most of the principal acts made in this reign were made upon petitions of the commons. However, even in these instances, where the motion for a law originated with the commons, and after the answer of the king was favourable, it still remained with the king and his council to digest the whole into the form of a statute, as in former times: the answer to the commons very often intimated, that the king would consult with others before he granted the petition; and this was never thought derogatory to their rights.

This will appear plainly from several petitions and answers on the parliament-rolls. In the 21st year of the king, to a petition, requesting the king to increase the fees of the judges, he answered, that he would call to him the great persons, and mention the matter to

(a) Parl. Hist. vol. I. 223.

(b) Hum. vol. II. 379.

them, and upon their advice would ordain such remedy as should be proper (*a*). Again, upon another petition in the same parliament, he answered, he would advise with his council. When petitions were delivered in, they were sometimes not attended to with so much dispatch as the commons expected. In the 22d year the commons prayed they might be answered presently; to which it was answered, that they should be answered after Easter (*b*). Notwithstanding these remonstrances, it continually happened that the making of laws was delayed; for though the petition might be answered at the session in which it was presented (and this was not always the case), yet sometimes several years elapsed before it was framed into a law. Most of the acts which in the statute-book appear in the 25th year of the king, were answered in the 21st year; some were delayed longer. The petition about error in the court of exchequer was presented first in the 21st year, and answered; but the petition and answer were both forgotten, and the commons petitioned again the next year, when the former answer was referred to by the king (*c*); and after all, it was not put into a statute till the 31st year (*d*). Many instances are to be found of the like delay.

When statutes were framed so long after the petition and answer, it is not to be wondered that they did not always correspond with the wishes of the petitioners, but were modified according to some after-thought of the king's officers who had the care of penning statutes. The commons often complained of this. In the 22d year they prayed, that the petitions answered in the last parliament might not, under pretence of any fresh bill or petition, be altered or changed. But, notwithstanding this remonstrance, the petition and answer were not always

(*a*) Cott. Abri, 21 Ed. III. 6. (*b*) Ibid. 22 Ed. III. 7. (*c*) Ibid. 21 Ed. III. 26. and 22 Ed. III. 25. (*d*) Stat. 31 Ed. III. st. 1. c. 12.

adhered to, as the exact model for the statute. In the 25th year, a petition was exhibited against suing before the council, when part of it was granted; as to the rest, the king said he would be advised (a); and yet stat. 25 Ed. III. stat. 5. c. 4. enacts the whole. Again, in the famous stat. 36 Ed. III. stat. 1. c. 15. about law proceedings, after the words of the petition are added, "*and that they be entered and enrolled in Latin*;" of which there is no notice at all in the petition (b).

The variations above mentioned do not appear to be very material; they did no more than explain in a fuller manner what perhaps was the sense and aim of the petition. It was more important when a petition was granted, and afterwards never heard of; an instance of which is to be found in 21st year, when a petition, praying that writs of error might be allowed in actions *qui tam*, was granted by the king; though there appears no subsequent statute to carry it into execution (c). There are many intimations in the parliament-rolls of acts being to be made, of which, however, we find no other trace whatever (d).

It is not probable that these petitions and answers were wholly disappointed of their effect, though they were not thrown into the form of a statute. It seems, the parliament, upon the petitions of the commons, exercised two branches of authority; by one of which it legislated, or made new laws; by the other, it interpreted the then existing law. When, therefore, a declaration of some point was prayed by petition, it was the business of the receivers and tryers of petitions to consider whether the matter prayed could be complied with, conformably with the then existing law; or whether it would be new, and inconsistent with it: for in the former case, an answer, accompanied

(a) Stat. 25 Ed. III. 16. (b) Cott. Abri. 36 Ed. III. 39. (c) Ibid. 21 Ed. III. 24.

(d) Among others, vid. Cott. Abri. 8 Ed. III. 20, 21, 22, and *passim* through that Abridgment.

with some instrument to testify it, would of itself be sufficient to warrant it; in the latter, there must be an express statute. It is in this way that the following words of stat. 15 Ed. III. c. 7. are to be understood: "That the petitions shewed by the great men and the commons be affirmed according as they were granted by the king; that is to say, some by *statute*, and the others by *charter* or *patent*, and delivered to the knights of the shire, without paying any thing."

Many examples of a like distinction may be produced out of the parliament-rolls. In the 21st year of the king, it was prayed by the commons, that a plaintiff in debt or trespass might have execution of the land which the defendant had the day of the writ purchased. To this it was answered, that it could not be done *without a statute*, upon which the king would advise with his council (a). Again, where the king granted lands forfeited for treason, the commons prayed it might be *declared*, whether in such case the donees held of the king, or of the lord of whom the traitor held. To this it was answered, that, for the present, it should remain as it had formerly been; but if *declaration* thereof was to be made, it should be by good advice, among other articles whereof *new law* was required (b). A similar answer was given to several other petitions in that parliament (c).

These passages very clearly intimate, that there was another parliamentary way of settling the law than by *statutes*; and that way must have been the *charters* and *patents* mentioned in the above act. Laws of this sort had no other sanction than the parliament-roll, where the answer was written; and these were probably what were called *ordinances*, being of equal force and validity with *statutes*, but less solemn and public, because they were only

(a) Cott. Abri. 21 Ed. III. 13.

(b) Ibid. 43.

(c) Ibid. 46, 47. 52.

a declaration, and not an alteration, of the law. A statute was drawn up with the advice and deliberation of the judges and other learned men, and was entered on a roll, called the *statute-roll*; afterwards the tenor of it was annexed to a proclamation-writ, directed to several sheriffs to proclaim it in their county (a). Ordinances were never proclaimed by the sheriff; but it was sometimes recommended by the king to the commons (probably by a *charter* or *patent*) to publish them in their county.

Though these were the peculiar and distinct offices of statutes and ordinances, it is still clear, that many things which were mere *declarations* of the old law, were done by statute, as appears by the formal words, and by the contents of several: and as every thing might be done by statute that could be done by ordinance, it depended perhaps on the nature of the subject, and the wish of the managers of it, whether the old law should be declared by one or the other. A statute was an ordinance, and something more; and therefore, though statutes may sometimes be called ordinances, yet no inattention to language would excuse the converse of the proposition. Though an ordinance could be altered by a statute, yet a statute could not be altered by an ordinance. After all, perhaps, the principal mark of a statute was, its being entered on the statute roll.

The rolls of parliament during this reign begin to be very complete, and form a very valuable accession to the documents of legal information. They give us an account of proceedings whether judicial or legislative; and in the former are more particularly full and satisfactory (b).

The reports of this reign fill four volumes. Reports.

(a) For the statute rolls, parliament rolls, and bundles of petitions, see Hale's Conjectures, Jurisd. p. 64.

(b) Manuscript copies of the parliament-rolls are to be found in many public libraries; and they have lately been printed by the authority of parliament.

Three of these are distinguished as *Year-books*, and are called the *first*, *second*, and *third parts* of Edward III. The other volume is called *Liber Assisarum*; being a collection of cases that arose on assises, and other trials in the country. The first part contains the first *ten* years of this king, very completely reported: the second part is incomplete, containing the 17th, 18th, 21st, 22d, one term of the 23d, the 24th, and so on to the 30th inclusive; then there is a chasm till the 38th and 39th, which closes the book. The third part begins with the 40th year (and thence it is commonly called the *Quadragesms*) and goes on regularly to the end of the reign. The *Liber Assisarum* contains every year regularly all through the reign.

These books of reports have not maintained an equal reputation with posterity; the book of assises and the *Quadragesms* having been generally preferred to the rest. But this comparative value is owing, perhaps, more to the accidents of time and circumstances, than to any intrinsic merit of their own. It happened, that many points of learning discussed in the first and second parts became more obscure, and less known, than those in the third part; in consequence of which, very few cases are abridged from the second part by Fitzherbert and Brooke, and hardly any from the first; and as these two abridgments became in after-times the principal clue to the Year-books, not to say the substitutes for them, the first part of these reports sunk into oblivion, and the second was little regarded; while the *Quadragesms* and the *Liber Assisarum* were alone consulted as depositaries of the law in this reign. It should seem, this neglect of the older Year-books had, unhappily, an effect upon the still older writings of Fleta and Bracton. A still wider chasm was made between those authors and the latter end of this reign; and as the chain of legal history by which their fidelity as lawyers would be best demonstrated, was broken, their credit and authority were considerably diminished.

However, viewing these volumes with the prepossession of a modern lawyer, we must certainly concur with the opinion long entertained in favour of the *Quadragesms* and book of assises; for, besides that questions are there discussed with more precision and clearness, they contain more of those points of law that have survived to the present times. In regard to precision and clearness, all the reports of this reign excel those of the preceding; but the merit of these volumes is of a peculiar kind, and has a very different appearance from what has in later times been considered as excellent in this way. We find here no learned argument, no quotation of cases, compared, distinguished, and applied to the point in debate. The bench rarely deliver a solemn judgment, setting forth the principles and grounds upon which they proceeded, or alleging any former determination by which they were swayed: a report is little more than a state of the facts, with *dicta* of law on both sides, unsupported by any authority. That the allegations and arguments of counsel should be unsupported by adduced authorities, is not at all remarkable at a time when there was such a scarcity of published reports. This want of written memorials of the law was repeatedly lamented in the reign of Edward the First; and one of the wisest means used by that king towards improving the law, was the ordering of law-books to be written; but the effect of such an undertaking must be slow. We find, in the reign of Edward the Second, the author of *The Mirror* complains that the law in his time was not sufficiently reduced into writing.

During such a state of things, the knowledge of the law must be confined to the practicers, and subsist rather in the experience of old professors than in volumes of reports; of which there must, in the nature of things, be few in this reign, and those kept, no doubt, with sufficient jealousy, for the use of their owners: the consequence of which would naturally be, that, with the use, the authority

of them in a great degree would be confined to their possessors. There were certainly no reports of established and general credit; otherwise it is not easy to imagine, why no adjudications are vouched for what is laid down as law in the Year-books of this reign. According to the form of these reports, every thing is to be taken on the bare authority of the person pronouncing it.

However unsupported they may seem, the reports of this reign have always had great weight with posterity, though received upon their own authority alone: nor is this without great shew of reason. These volumes seemed to claim a higher regard than any which had been produced in the preceding reigns. The law here spoke out in its own written annals, and was delivered by the oracles of it, the judges sitting on the seats of justice. The whole method of legal proceeding was exhibited to the reader. This was a lively way of transmitting the knowledge of our laws; it commanded a more serious regard, and seemed to carry in itself an incontrovertible authority; unlike the treatises written by private men, who, however learned or experienced, could not aim at an equal degree of authenticity. This consideration placed reports in the highest rank of law-books, and made them a sort of authorities in themselves; while the treatises of Bracton and Fleta grew to be less considered, and at length became obsolete.

The reports of this reign engage the attention of a modern lawyer more readily than those of the former, and have always been held in great esteem. The learning, however, of these volumes is of a peculiar kind. Through all the reports of this reign there is perpetual debate on matters of form; which were so repeatedly discussed, and so fully examined, that numberless points of the utmost importance in the practice of those times were settled. The greater part of the reports of this reign seem to be on this subject. To say nothing of the first forty years of this king, upon turning over the celebrated *Quadragesms* it will

appear, that nine parts in ten relate to the forms of writs, of pleadings, and of practice; and of these nine, six parts concern real actions.

While the same state of things remained, and the same learning was in vogue, the reports of this reign must have been of great use, and accordingly deserved every encomium which the grateful student could bestow on them; they were accordingly held in great estimation, during most of the succeeding reigns, till the time of Henry VII. and Henry VIII. But when another order of things took place; when real actions went out of use, and the learning concerning them was forgotten; the legal annals of this reign must be viewed with a very different eye. Amid heaps of endless curiosity about proceedings in real actions, we find a very small space occupied by decisions on great and leading principles of law. This anxious minuteness in the form and conduct of actions had so loaded and entangled the practice of the courts, that it was found necessary, in after-times, to get rid of them altogether by a revolution in the course of legal remedies. The law-learning of Edward the Third's reign, and the scholastic learning of those times, exhibit alike an unhappy misapplication of sagacity and diligence; and it is only by a partial redemption, that the volumes which contain the one, have escaped that oblivion which has long overwhelmed the other.

The reign of this king has furnished three small tracts on law subjects: the *Old Tenures*, *Old Natura Brevium*, and *Novæ Narrationes*.

The *Old Tenures* (so called to distinguish it from Littleton's book on the same subject) gives an account of the various tenures by which land was holden, the nature of estates, and some other incidents to landed property. It is a very scanty tract, but has the merit of having led the way to Littleton's famous work. The *Natura Brevium* contains

Old Tenures.

Natura Brevium.

those writs which were then most in use, annexing to each a short comment concerning their nature, and the application of them, with their various properties, effects, and consequences. This work became a model to Fitzherbert, in writing his valuable treatise on the same subject. The collection called *Novæ Narrationes* contains pleadings in the actions then in practice. It consists principally of declarations, as the title imports; but there were sometimes pleas, and the subsequent pleadings. The *Articuli ad Novas Narrationes* is usually subjoined to this little book, and is a small treatise on the method of pleading. It first treats of actions and courts; then goes through each particular writ, and the declaration upon it, accompanied with directions, and illustrated by precedents. The book on *The Diversity Courts* is said (b) to have been written in this reign.

Miscellaneous
facts.

It is beyond dispute, that the Temple was inhabited by a law society in the reign of Edward the Third. Upon the dissolution of the order of Knights Templars in the last reign, their possessions came to the crown. The *New Temple*, as it was then called, to which they had removed from their house in Holborn, about the beginning of Edward the Second's reign, was granted by the late king successively to the earl of Lancaster, the earl of Pembroke, and Hugh Despencer the son, upon whose several attainders this property again devolved to the crown. In pursuance of a decree made by the great council at Vienna, anno 1324, respecting the possessions of the Templars, king Edward the Third granted this building to the Knights Hospitallers of St. John of Jerusalem; and they soon afterwards, as the tradition is, demised it at the rent of 10l. per ann. to divers professors of the law, who came from *Thavies Inn* in Holborn (b). At the general dissolution of

(a) 2 Inst. 552.

(b) Dugd. Or. Jur. 145.

religious houses, when the inheritance of this house again fell to the crown, King Henry VIII. granted them a lease, and they continued tenants to the crown till the 6th year of King James I. when that king granted *hospitia et capitalia messuagia cognita per nomen de le INNER et le MIDDLE TEMPLE, sive Novi Templi*, to Sir Julius Cæsar and others, to them and their heirs, for the use and reception of the professors and students of the law (a).

It is said, that some professors of the law resided in Gray's Inn during this reign, under a lease from the lord Grey of Wilton, who was seised of the inheritance, and had a mansion there. The inheritance was, in 20 Ed. IV. purchased by the prior and monks of the monastery of Sheene in Surry, to whom the students continued tenants, at the rent of 6l. 13s. 4d. per ann. At the dissolution of religious houses, Henry VIII. granted the inheritance to the society at the above rent, in fee-farm (b).

The most authentic memorial of any settling of the law-societies in this reign, is a demise in 18th of Ed. III. from lady Clifford, *apprenticiis de banco* (c), of that house near Fleet-street called Clifford's Inn.

The chancery, as well as the king's bench, followed the court, and the chancellor and his officers were intitled to part of the purveyance made for the king, till the 4th of Edward III. when he fixed his seat at Westminster. The place where the chancellor held his court was at the upper end of Westminster-hall, at a great marble table (which is said to be covered by the courts since erected there), to which there was an ascent by five or six steps (d).

The salaries of the judges, though they had continued the same from the time of Edward I. to the 25th of this reign, were again become very uncertain. In 28th of Edward III. it appears, that one of the justices of the

(a) Dugd. Or. Jur. 145. (b) Ibid. 272. (c) Ibid. 141. (d) Ibid. 37.

king's bench had 80 marks per ann. In 39 Ed. III. the judges had in that court 40l. The chief and other barons in 36 Ed. III. had 40l. In 39 Ed. III. the justices of the bench had 40l. and the chief of the king's bench 100 marks (a).

A house had been founded by Henry III. for the reception of convert Jews. The presidency of this house had been usually granted to some of the clerks in chancery, namely, those *de primâ formâ*, who were always ecclesiastics, and lived as a part of the chancery in the king's palace till the 4th of Ed. III. In the 15th Ed. III. the headship of this house was annexed by charter to the keepership of the rolls, which was confirmed by act of parliament in the 51st year of this king. The keepership of the rolls was thereby rendered more considerable; being endowed with this house of the gift and patronage of the king, the nomination of clerks of the rolls was by degrees assumed by the crown, in exclusion of the chancellor. This officer for keeping the rolls was anciently called *Gardein de Rolls; Clericus et Custos Rotulorum*; then *Clericus Parvæ Bagæ, et Custos Rotulorum et Domûs Conversorum*. In no statute is he called *Master*, till the 11th of Henry VII. cap. 18; and again, in 25th chap. of the same statute, he is called *Clerk*. This office was considered as a preferment for ecclesiastics (b).

(a) Dugd. Or. Jur. 105.

(b) Hist. Chanc. 21.

CHAP. XVII.

RICHARD II.

Copyholds—Statutes of Liveries—Of the Clergy—Heretics—Vicarages—Mortmain—Statutes of Labourers—Of Pernors of Profits and Uses—Judicature of the Council—Of the Parliament—Origin of the Court of Equity in Chancery—Court of the Constable and Marshal—Of the Admiral—Court of Exchequer—Statutes of forcible Entries—Of Treasons—Scandalum Magnatum—Game Laws—Justices of the Peace—The King and Government.

IN the reign of Edward the Third we took a short view of the law in general, comparing it in many instances with its ancient state, as delivered by Bracton and the older writers. It seemed that a great object would be attained, if a connection and dependence could be shewn between the learning of these two periods in our ancient law. After this, perhaps, the reader will be content that the remainder of the subject should be drawn into a smaller compass, and treated less in detail.

However, this wish to set bounds to our enquiry must be governed by the nature of the materials. The progress made in the alteration or improvement of the law by decisions of courts, is by many, and those very short steps; and to pursue these with minuteness, if at all possible, would, when on questions not wholly new, be unentertaining and tiresome: but it is very different with statutes; they make a long stride at once, and the advance thereby effected is too discernible to be passed over in silence. It appears

therefore incumbent upon a juridical historian, whatever liberty he may take with one part of his materials, at least to state the substance of statutes with fulness and fidelity. Conformably with this idea we shall, in the remainder of this work, continue to give the statutes at length, as in the former reigns; but in what relates to the decisions of courts, we shall be more sparing; sometimes confining ourselves to such adjudged cases as relate to the new points, which were now arising in many branches of our jurisprudence.

In the present reign, we shall omit all notice of the decisions of courts; partly because the reader, who has just left the preceding reign, will perhaps, for the reason above-mentioned, not wish it; partly because no year-book of this reign is existing, and the remnants and abstracts of adjudged cases, which are to be found in different compilations, are not of much importance, and would hardly add a link to the chain of our historical deduction. In the mean time, the parliamentary alterations of the law are of great moment, and will amply make up for the deficiency in the other head of enquiry. We shall therefore take a view only of the statute-law of this reign; and we shall divide it into such as is of a miscellaneous kind, and such as relates to the rights of property, and the administration of justice.

To begin with the former. A statute was made in the 21st year of the king, to annex to the county of Chester certain forfeit lands which had belonged to the earl of Arundel: it was at the same time enacted, that the county of Chester should thenceforward be called *The Principality of Chester*, and should always go to the king's eldest son, with the rights and franchises thereto belonging (a).

In order to secure the regular attendance of persons in

(a) Stat. 21 Ric. II. c. 9. Vid. ant. vol. I. 48.

parliament, it was thought fit to make a statute, in the 5th of the king (*a*), ordaining, that all persons and commonalties which from thenceforth should have summons to come to parliament, should attend, as they were bound to do, and had formerly done: and it was enacted, that if any so summoned, whether archbishop, bishop, abbot, prior, duke, earl, baron, banneret, knight of the shire, citizen of city, burgess of borough, or other singular person or commonalty, absented himself (unless he could reasonably and honestly excuse himself to the king), he should be amerced, and otherwise punished, as formerly; the same of sheriffs who were negligent in making returns of parliamentary writs, or who left out of the returns any cities or boroughs which were bound, and formerly were wont to come to parliament. The election and return of members to serve in parliament, were further considered in the two subsequent reigns.

In the 12th year of the king, an act was made to remove some doubts which were entertained about the levying of the expences of knights of the shire upon lands held by lords. To settle this, it was enacted, that they should be levied as formerly, with this consideration, that if any lord, or any other man, spiritual or temporal, had purchased lands or tenements, or other possessions, which were contributory to such expences before the time of the purchase, they should continue contributory as before.

The feudal bond between lord and vassal had been of late years growing weak; and we find now, that villains and land tenants had begun to break out into violent demands for an exemption from the servitude in which they were held by their tenures. In the first year of this king's reign a statute (*b*) was made, appointing commissioners to enquire into these differences. It seems, that many of these claims were pretended to be founded on the evidence

(*a*) Stat. 2. c. 4.

(*b*) Stat. 1 Rich. II. c. 6.

of Domesday-book, which was nothing more than demanding, in other language, to be put in the condition of landholders in the time of Edward the Confessor; the cry that had been kept up in the early times of the Norman constitution. These matters, as far as the claim of right went, were referred to the examination of the parliament, while the justices of the peace were commissioned to suppress the tumults and outrages committed by the claimants. The impatience expressed by these inferior landholders might be encouraged by the ancient title which they now seemed to possess in their lands. Instead of the precarious holding at the absolute will of the lord, as originally, we find in the latter end of the last reign, mention of *tenants by copie of court roll*; which indicates, that villenage was, in some places at least, become of a more stable nature, and villain-tenants were enabled to set up a species of *title* against their lord. However, this tenure *by copy* is not mentioned in the Old Book of Tenures, nor does any discussion upon it appear in the reports of Edward III. We must therefore wait till a later period, when it was more generally acknowledged, for a better account of this new species of tenure.

Statutes of
liveries.

The condition of the times, and the turn of manners which now prevailed, made it desirable and necessary for great lords to supply this defection in their tenants by other expedients (a). It accordingly had become the custom to *retain* persons in their service, to be at call, when their lords affairs needed their support: and in order to distinguish different partisans, as well as to give a splendour to such retinue, they used to dress them in *liveries*, and *hats* of a particular make or colour. This distinction of dress gave origin and strength to a spirit of party, which became very general. Besides those who were retained by great men, fraternities used to be

(a) Vid. ant. vol. II, 372.

formed of persons concurring in the same sentiments and views, who bound themselves to support each other on all occasions, and denoted their union by similarity of dress. Thus, the country every where abounded either with the adherents of great men, or societies which were ready to become such; and persons of weight and influence could never want a set of determined followers to maintain and abet them in any public violence or dangerous scheme of ambition.

These confederacies became a terror to the government, and were the occasion of the *statutes of liveries* passed in this and the following reigns. The first of these is stat. 1 Ric. II. 2. c. 7. which ordains, that no livery be given by any man for maintenance of quarrels and other confederacies, upon pain of imprisonment and grievous pain to the king. This statute speaks of *esquires*, as well as others, being the sort of people who used to be retained in this way. By stat. 16 Ric. II. c. 4. it was provided, that no yeoman, nor other of lower estate than an *esquire*, should use or bear livery, called *livery of company*, of any lord, unless he was menial and familiar, and continually dwelling in the lord's house. There is no earlier mention of an *esquire* than in these acts; it seems to have been not a very high rank in the orders of society, being only next above a yeoman (a). As the giving of liveries was a matter in which *the peace* was principally interested, we find in stat. 20 Ric. II. c. 1. for enforcing the statute of Northampton, and declaring *lancegaies* and armour to be unlawful, a clause ordaining that no lord, knight, nor other, should go, or ride armed, by night or by day, nor bear pallet nor skull of iron, nor of other armour, except the king's officers and ministers; and moreover, that the

(a) The *Franklein*, as described in a cotemporary work, I mean Chaucer's *Canterbury Tales*, seems to have been a higher order of yeomen; such as a *wealthy farmer*, or *gentleman farmer*. Vid. *Canterb. Tales*, the *Franklein's Tale*.

above statutes of liveries and hats should be observed. The cognizance of these statutes was first submitted to the jurisdiction of the justices of assise, and afterwards to that of the justices of the peace.

Of the clergy. Notwithstanding the precarious authority which Richard held among his contending nobles, he maintained with firmness the opposition begun by Edward III. to clerical usurpations (*a*). New statutes of provisors were enacted; and while the independence of the national church was vindicated, some steps were taken towards preventing the bad effects of *appropriations*; some regulations were also made for the security of tithes, and the personal privilege of clerks. We shall mention these provisions in the order in which they were made.

The first act relating to the clergy was stat. 1 Ric. II. c. 3. which gives prelates and clerks an action of trespass against purveyors to recover damages for a breach of any of the statutes made in the last reign against those oppressors of the people (*b*). This was, because they could not by any of those acts proceed criminally against purveyors. Complaint was made, that indictments used to be preferred against prelates and clerks suing for their right in the spiritual court, and even against spiritual judges for entertaining the suit; and under colour of such indictments they used to be imprisoned, and otherwise vexed, till they entered into obligations and promises to desist from their suits. It was enacted by the same statute, ch. 13. that such obligations should be void; that the procurers of such indictments, if the party was acquitted, should be prosecuted as directed by stat. Westm. 2. c. 12. (*c*) and that the justices before whom the acquittal was, should have power to enquire of such procurers, and punish them as they deserved. Again, it was provided by the following chapter of the same act, that where an action for goods

(*a*) Vid. ant. vol. II. 375.

(*b*) Vid. ant. vol. II. 369.

(*c*) Vid. ant. vol. II. 210.

taken and carried away was brought for tithes against a parson, and he pleaded that it was a matter of tithes belonging to his church, the general averment should not be taken without shewing specially how they were his lay chattel.

Complaint was made in the last reign, of priests being arrested in church, and a general provision had been framed to prevent it (*a*); but now it was more specially ordained, that any of the king's ministers so doing should be imprisoned, and pay a fine to the king, and compensation to the party; only this was not to extend to clerks who held themselves within churches or sanctuaries by fraud or collusion. The persons intitled to this privilege are thus described by the preamble of the statute: Clerks in cathedral or other churches, or churchyards, and those bearing the body of our Lord to sick persons.

Notwithstanding the statutes made in the last reign (*b*) to restrain the gifts of church-benefices to aliens, that practice still continued; and, many livings being held by foreigners, all the ill consequences following from non-residence were miserably felt. A new act was now made to prevent, if possible, this irregular and destructive practice. It was enacted by stat. 3 Ric. II. c. 3. in the most explicit terms, that no one, without the licence of the king, should receive procuracy, letter of attorney, ferm, or other administration of any benefice within the realm, from any person, except the king's liege subjects. As foreign incumbents could not manage the revenues of their benefices but by some of the above means, it was intended hereby to make them ever after unproductive to the possessor. It was moreover ordained, that every one, who had accepted such procuracy or administration from aliens, should abandon it within forty days after publica-

(*a*) Vid. ant. vol. II. 388.

(*b*) Vid. ant. vol. II. 379.

tion of this act. None were to convey money or other things out of the realm for the use of such alien incumbents. If any was guilty of a breach of this act, he was to incur the penalties of the statute of *provisors*, 27 Ed. III. by the process ordained in that act; in addition to which process it was now ordained, that should the offenders be out of the realm, and not beneficed, nor have any possessions within the realm, where they might be warned, then a writ should be made in the chancery grounded upon this ordinance, directed to the sheriff of the county where they were born, returnable in one bench or the other; which writ was to issue at the king's suit. This writ was to command, that proclamation be made for them to appear at a certain day in the bench where the writ was returnable, at the distance of half a year, to answer the matters contained in the writ; and, upon the return thereof, the justices were to proceed in the above form. It was also ordained, that no bishop should meddle with the benefice of such alien, by sequestration, or in any other manner.

It is said (*a*), that the lords spiritual did not assent to this statute; which, it may be observed, is all through termed an *ordinance*. Indeed, the higher clergy were not much interested to suppress this practice; as they still enjoyed their bishoprics, and might have views at the court of Rome, which they would be very ready to promote by a connivance at practices so advantageous to the pope and his adherents. But though these pious prelates did not contribute their sanction to a national provision for the maintenance of alms and piety, they were not ashamed to palm upon the country an ordinance of their own fabrication, as a legislative act, though the consent of the commons was never taken. But this was a case in which their influence and dignity were concerned, and where they did

(*a*) Vid. Cott. Abri. ad locum.

not think it wise to be over-scrupulous. The act alluded to is stat. 5 Ric. II. st. 2. c. 5. which was levelled at the followers of *Wickliffe*, who by their lives and doctrines, as well as by their numbers, had become a terror and reproach to the higher orders of the church. These people are described as persons who went from town to town, under pretence of great holiness, and ^{Heretics.} without the licence of the ordinary, or other authority, preaching daily in churches, churchyards, markets, fairs, and other open places, uttering in their sermons heresies and notorious errors. To give better colour to violent measures, it is added, that they preached divers matters of slander, to engender discord and dissension between divers estates of the realm.

These preachers had been frequently brought before the bishops, but without their admonitions producing any effect. To make quick work, it was now ordained, that the king's commissions should be directed to the sheriffs and other officers, or other learned persons, in pursuance of certificates from the bishops, to be made in the chancery from time to time, to arrest all such preachers, with their maintainers and abettors, and hold them in prison till they would justify themselves according to the law and reason of holy church. Thus was the secular power to be let loose upon the followers of *Wickliffe*, whenever it seemed good or expedient to the bishops. This provision was highly resented by the commons; who in the next year declared, they meant not to bind themselves and their heirs to the prelates, any more than their ancestors had done; and that they therefore never consented to the law: it was accordingly revoked by the king (a).

In the seventh year of the king, the subject of *alien-incumbents* was again taken up; the statute made in the

(a) Cott. Abri. p. 285. § 52.

third year was confirmed; and it was moreover enacted by stat. 7 Ric. II. c. 12. that the provisions of it should extend to all aliens purchasing, or who had purchased benefices; and they were likewise to incur the penalties of stat. 25 Ed. III. stat. 5. c. 22. made against those who purchased provisions of abbies or priories. The king likewise commanded all persons to abstain from praying of him licences for such purchases. To facilitate the execution of this and the former statutes, it was the same year ordained (*a*), that persons against whom writs of *præmunire facias* were sued (*b*), and who were then out of the realm, or should go out of the realm by the king's licence, if they were of good fame, might appear by attorney.

These practices of the churchmen were pursued still further by the legislature. In stat. 12 Ric. II. c. 15. it was ordained, that no liege-man should go or send out of the realm, by licence or without (unless he had the special leave of the king himself), to provide or purchase for him a benefice; and that any such person should be considered as out of the king's protection, and the presentation be void. Again, by stat. 13 Ric. II. stat. 2. c. 2. the stat. 25 Ed. III. st. 6. was confirmed (*c*); and it was moreover enacted, that if any one accepted a benefice contrary to that act, and was beyond sea, he should remain exiled and banished out of the realm for ever; and his lands and tenements, goods and chattels, forfeited to the king: if within the realm, he was to leave it within six weeks next after his acceptance, and remain banished for ever; and any one receiving such banished person was to be punished in the same manner. It was moreover provided, if any one sent or sued to the court of Rome, whereby any thing was done contrary to this act; such offender, if a prelate, should forfeit one year's value of his temporal-

(*a*) Ch. 14.

(*b*) Vid. ant. vol. II. 384.

(*c*) Vid. ant. vol. II. 380.

ties; if a temporal lord, the value of his lands and possessions not moveable, for a year; if any inferior person, he was to pay the value of the benefice for which suit was made, and be imprisoned for a year. But if any man brought or sent within the realm, or within the king's power, any summons, sentences, or excommunications against any one *for the cause of making motion*, assent, or execution of the said statute of *provisors*; he was to be taken, arrested, and put in prison; he was to forfeit his lands and tenements, goods and chattels, for ever, and moreover incur the pain of life and member. If any prelate made execution of such summons, his temporalities were to be taken into the king's hands, till due redress and correction was made therein; and a person of less estate was to be imprisoned, and make fine and ransom according to the discretion of the king's council (*a*).

The two last acts struck deep into the papal authority, and were viewed not without jealousy by the bishops, who were thus gradually withdrawn from the protection of the papal see, and left to the common course of the laws. To shew their apprehensions on this subject in a way that would carry an appearance the least offensive, they preserved a silence respecting themselves, but ventured to discover great concern for the interest of the pope. Towards the close of this parliament, we find that the archbishops of Canterbury and York for themselves, and the whole clergy of their provinces, made their solemn protestation in open parliament, that they in no wise meant, nor would assent to any statute or law made in restraint of the pope's authority, but would utterly withstand the same; which protestation was at their desire enrolled (*b*).

However, on another occasion, the clergy acted in conformity with the wishes of the commons, though with a

(*a*) Ch. 3.

(*b*) Cott. Abri. p. 332. § 24.

reservation of their opinion. This was at the passing of stat. 16 Ric. II. c. 5. which subjected those who purchased bulls from Rome to a *præmunire*. The statute is introduced by a long preamble, which states, That all the lords, both spiritual and temporal, had been singly asked in parliament, whether they would support the king in maintaining his authority against the pope's bulls, which were purchased to prevent the execution of judgments passed in the secular courts about advowsons.

The temporal lords declared such interference to be a violation of the old established law of the land; and the lords spiritual having made protestation that it was not their mind to deny nor affirm that the bishop of Rome may not excommunicate bishops, or make translations of prelates, after the law of holy church (the doing this without the king's consent being one of the grievances now complained of, and upon which they had been questioned in the same manner as upon the other); they said, that censures of excommunication against any one for executing the process of the king's courts were *against the king and his crown*. It was therefore enacted, that if any purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any such translations, processes, sentences of excommunication, bulls, instruments, or any other thing against the king's crown and dignity; or receive, or make notification, or any other execution within the realm, or without; they, their notaries, procurators, maintainers, abettors, and counsellors, should be put out of the king's protection; and their lands and tenements, goods and chattels, be forfeit to the king. Such offenders were to be attached, if they could be found, and brought before the king and his council; or process of *præmunire* was to be awarded, as in other cases of provisors, and of those who sued in any court in derogation of the king's royal authority.

When the incroachments of a foreign ecclesiastical power were repressed, it remained to provide for the internal welfare of our own church, which could not be better effected than by securing a competent maintenance to the parochial clergy. The manner in which the clerical office was discharged, and the state of dependence and poverty in which the labouring part of the priesthood were kept, through the practice of appropriations, particularly those of the monasteries, called aloud for the interposition of the legislature. Pensions, which had been put under the sole cognisance of the bishops by stat. *Articuli Cleri* (a), had thereby suffered some restraint; and having been lately condemned as uncanonical by a decree of Pope Clement the Third, the patrons of church-benefices were set upon practising more frequently the stratagem of appropriations.

Instead therefore of exacting arbitrary rents and pensions from the poor clergy whom they had presented to benefices, they got into the habit of taking the whole profits of such livings into their own hands, by a licence *to appropriate*; and after that, they provided for the cure of the parish (being only a secondary concern) in some other way. The monks who enjoyed such appropriations, sometimes resided on the cure, and officiated by turns: this they performed by some settled rotation among themselves; and as it was a burthen, the service was not unfrequently imposed as a penance. A duty discharged in this way was, on many pretences, shifted from one to another: these changes produced intermissions and neglect in the pastoral care, and occasioned great scandal. As a remedy for this, the monks would depute some person to do the duty regularly, upon a scanty salary; and this was the constant practice with lay-patrons, as the only method by which they could serve the cure. The miserable subsistence of these *curates* could

(a) Vid. ant. vol. II. 291.

not fail of bringing their persons and office into a degree of contempt. The bishops had often interposed in order to correct these abuses; by degrees they restrained the monks from taking upon themselves the cure of souls, and obliged them to retain fit and able deputies, with competent salaries annexed to their appointment. These were called *curates*, *vicars*, or *capellans*, according to the notions prevailing in different places.

The injunctions of the bishops were at length seconded by the legislature. An act was made in this reign, with a design of putting this institution of vicars and curates upon a more permanent establishment, and also to provide for a due application of such portion of the profits of benefices, as was designed for alms and hospitality; for it was enacted by stat. 15 Ric. II. c. 6. that in every licence to be made in the chancery for the appropriation of a parish-church, it should be expressly contained therein, that the diocesan of the place, upon the appropriation of such church, should ordain, according to the value of the church, a convenient sum of money, to be distributed yearly, of the fruits and profits thereof, to the poor parishioners, in aid of their living and sustenance; *and also, that the VICAR be well and sufficiently endowed.* The parliament went no further at present than to make this general injunction, which was more particularly explained and enforced in the next reign.

Mortmain. Before we dismiss the subject of the clergy and of clerical possessions, it will be proper to take notice of a new statute of mortmain enacted in this reign. The ingenuity of the ecclesiastics was still employed in devising methods to evade the restraints of the mortmain-act (a). One of their contrivances was to consecrate land, as for a burying-ground; and under that pretence they purchased considerable property in mortmain. This used to be done without the licence of the king or chief lords,

(a) Vid. ant. vol. II. 154.

merely by authority of *bulls* from Rome. As this was a sort of device which seemed to be within the terms *arte vel ingenio* of the statute of mortmain, the parliament, by stat. 15 Ric. II. c. 5. declared it so to be, as likewise the purchase of lands *to the use* of religious persons. This act also declared, that the statute of mortmain should be extended to lands, tenements, fees, advowsons, and other possessions, purchased to the use of *guilds* and *fraternities*. Moreover, because mayors, bailiffs, and the commonalty of cities, boroughs, and other towns, which have a perpetual commonalty, and others that have offices perpetual, were *as perpetual* as religious institutions; it was declared, that any purchases by them, or *to their use*, should be within the statute of mortmain. Thus was the jealousy originally excited by the wealth of the clergy felt in respect to lay corporations, which were, therefore, now subjected to the same restraints in making purchases of lands and tenements.

Another device practised by ecclesiastics, was to get their villains to marry free women who had inheritances, so that the lands might come to their hands by the right which the lord had over the property of his villain. The commons, in the 17th year, petitioned against this contrivance: the answer given was, that sufficient remedy was provided by the statute (a); meaning, probably, the words *arte vel ingenio* in the statute of mortmain; which, however, had been already found ineffectual in other instances that appeared intitled to the same construction.

The statutes of labourers, made in the last reign, were confirmed, and further regulations were made on this subject. The lower orders of people were, in consideration of law, divided into *servants*, *labourers*, *artificers*, and *beggars*; and different regulations were provided for them, as they came under one or other of these descriptions. One great point in the policy of

Statutes of
labourers.

(a) Cott. Abri. p. 355. § 32.

managing *servants* and *labourers*, was to prevent their wandering from place to place. It was enacted, by stat. 12 Ric. II. c. 3. that no servant (either man or woman) should depart at the end of his service out of the hundred, rape, or wapentake where he dwelt, to serve or dwell elsewhere, unless he brought a letter patent, containing the cause of his going, and the time of his return, if he was to return, under the king's seal; for which purpose a seal was to be in the keeping of some good man of the hundred, city, or borough, at the discretion of the justices; and a servant or labourer found wandering without such letter was to be put in the stocks, and there kept till he had found surety to return to his service, or to serve or labour in the town from whence he came. Persons receiving such wanderer not having a letter, were to be fined by the justices, if they harboured him more than one night.

Artificers, and persons of mysteries that were not very needful, were to be compelled to work at harvest-time. The wages of labourers (*a*) in agriculture were fixed by statute; and those giving or taking more were subjected to the penalty of paying the value of what they gave or took beyond the stated wages: for the third offence, the taker, if he had not wherewith to pay, was to be imprisoned for forty days. In order that there might always be hands to do country work, it was ordained (*b*), that all men and women who had been used to labour at the plough and cart, or other service or labour in husbandry, till they were twelve years of age, should abide at the same without being put to any mystery or handicraft; and all covenants of apprenticeship to the contrary were declared void.

To prevent disorders, it was ordained (*c*), that no servant, labourer, nor artificer, should carry a sword, buckler, or dagger, under pain of forfeiting the same, except in time

(*a*) Ch. 4.

(*b*) Ch. 5.

(*c*) Ch. 6.

of war, or when travelling with their masters; but they might have bows and arrows, *and use them on Sundays and holy-days*. They were required to leave all playing at tennis or football, and other games called quoits, dice, casting of the stone kails, and other such *importune games*. All offenders against this statute might be arrested by sheriffs, mayors, bailiffs, and constables, and their arms taken away. This is the first statute that prohibited any sort of games and diversions.

Thus far of servants, labourers, and artificers, being the industrious part of the lower class of people. Next, as to *beggars*. It was enacted (*a*), that persons who went begging, and were able to serve or labour, should be treated as those that departed out of the hundred without letter testimonial; and beggars *impotent to serve*, were to abide in the cities and towns where they were dwelling at the time of the proclamation of this statute. If such towns were not able to provide for them, they were then to withdraw themselves to other towns within the hundred, or to towns where they were born, and there continue during their lives.

Thus we find no other provision for the poor, than begging within a certain district. This idea of provision might be encouraged by the plan on which church benefices and religious houses were bound to dispose of part of their incomes. A certain portion of every living was for the maintenance of alms and hospitality, the proper disposal of which, we have seen, was secured by a statute in this reign (*b*); and the gates of religious houses were daily attended by troops of beggars, who received a regular donation of food, and sometimes of money. These institutions, no doubt, contributed to increase the number of idle beggars, and made it necessary for the legislature to observe a distinction

(*a*) Ch. 7. (*b*) Vid. ant. 168.

between those who were able to serve and labour, and those who were impotent.

The conclusion of this act makes mention of two very remarkable sorts of beggars, which are worthy of observation, as they mark, in a particular way, the manners of the times. It enacts, that all those who go *in pilgrimages* as beggars, and are able to travel, shall be treated in the same manner as servants and labourers, if they have no testimonial of their pilgrimage under the great seal; and that *scholars* of the university who went begging in that manner, should have letters testimonial of their chancellor, under the penalty of being treated in the same manner. The going on pilgrimages is mentioned, more than once, in the statutes of this time, as a dissolute custom in all sorts of persons, and was particularly so when made a pretence for beggars wandering about the country.

Another set of wandering beggars were persons returning or pretending to be returning to their own houses from abroad. It was required (*a*), that all such persons should have letters testimonial of their captains, or of the mayors or bailiffs where they arrived; and the mayors and bailiffs were to inquire of them where and with whom they had lived, and where they had dwelt in England; and then make them letters patent under the seal of their office, testifying the day of their arrival, and where they had been, according to their own account. The mayors and bailiffs were to cause them to swear, that they would hold their right way towards their country, except they had letters patent under the great seal to do otherwise. If any such person was found travelling without his testimonial, he was to be treated in the manner in which servants and labourers were. Thus were vagabonds to be *passed* to their own home. In the above regulations we see the first outline of our present

(*a*) Ch. 8.

system of poor laws: the course here traced out was amended and corrected by subsequent statutes as occasion required, or later experience pointed out defects, till the whole was reconsidered in the reign of Queen Elizabeth, and after some alteration and improvement was thrown into one principal statute (*a*).

There was an alteration made in one of the above acts, by stat. 13 Ric. II. c. 8. Upon consideration it was thought adviseable not to let the rate of wages continue as fixed by that statute, which, by the alteration in the prices of provisions, might become very hard and inadequate; and therefore by this new act, the justices in their sessions between *Easter* and *St. Michael* were to make proclamation, according to the dearth of victuals, how much every mason, carpenter, tiler, and other craftsman, workmen, and other labourers, should take by the day, as well in harvest as in other parts of the year.

Having disposed of the statutes of a miscellaneous nature, we come now to those on private rights, and the administration of justice. The statute made in the last year of Edw. III. (*b*) against fraudulent gifts of lands and goods to avoid the executions of creditors, was followed up by two others of a similar nature, enacted in the first two years of this king. The stat. 1 Ric. II. st. 2. c. 9. went further, and aimed at these collusive transactions, ^{Of perjury of} when practised for other purposes than defraud- ^{profits & uses.} ing creditors. It was complained, that many people having right and title to lands, tenements, and rents, and also to personal actions, were delayed of their rights and their actions, because the occupiers and defendants commonly made gifts and feoffments of their lands and tenements in question, and of their goods and chattels, to lords and other great men of the realm, against whom the claimants dared

(*a*) That is, 5 Eliz. to which may be added the statute of the same reign about vagabonds.

(*b*) Vid. ant. vol. II. 401.

not make suit. Again, many disseisins were committed ; and immediately the disseisors made alienations and feoffments, sometimes to lords and great men of the realm, to have maintenance ; and sometimes to persons whose names were wholly unknown to the disseisees, in order to delay them from their recovery. To remove these mischiefs, it was ordained, in the first case, that such feoffments and gifts of lands and goods should be void ; and, in the second case, that the disseisees should have their recovery against the first disseisors, as well of the lands and tenements as of their double damages, without having regard to such alienations, so that the disseisees commenced their suits within a year next after the disseisin. This was to hold in every plea of land where feoffments were made by fraud and collusion, so as recovery might be had against the first feoffor ; though this was to be understood where such feoffors *took the profits*.

When persons making such feigned gifts withdrew into privileged places, and there continued taking the profits of their lands and goods, it was enacted, by stat. 2 Ric. II. st. 2. c. 3. in all cases of *debt*, that after the *capias* was awarded, and the sheriff returned that he had not taken the defendant, because he had fled to a privileged place, another writ should issue, commanding proclamation to be openly made at the gate of the place, by five weeks continually, once a week, admonishing the party to appear at a certain day before the justices, to answer to the plaintiff ; and if the party came not in person, or by attorney, judgment was to be had against him for the sum in demand, and, after the collusion and fraud proved, execution levied of such lands and goods as he had out of the privileged place.

These gifts of lands, which are termed collusive and fraudulent, were a modification of real property that was now growing very common, and was better known afterwards under the title of *gifts to a use*. The legal possession of land by one man while another enjoyed the profits,

seems to have been not unknown before this reign; though it was not till lately that it had become common, and begun to undergo some discussion. The idea upon which they made this division between the land and the profit, was that of raising a *trust*; namely, when a man would confide in the conscience of another with more security than in his own possession. This was likely enough to happen at all times and in all places, and must be recognised more or less by all systems of law. There is mention of such uses very early in our juridical history. When an ancestor infeoffed his (a) eldest son, in order to avoid the claim of guardianship, he, no doubt, retained to himself a right to the profits during his life: but when the effect of such feoffments was taken away by the statute of Marlbridge, such uses were no longer resorted to, or thought of. It became an opinion in later times than those of which we are writing (b), that, after the statute of *Quia emptores*, if a feoffment was made without consideration, the use resulted to the feoffor; and therefore, that the origin of uses is to be ascribed to that period.

But, without straining the fancy after conjectures, there are some authentic notices of an early period clearly evincing, that land might be in the seisin of one person, while a right to the emoluments was in another. To say nothing of the statute of Kilkenny (c) made in the reign of Edward II. in which act there is mention of such secret feoffments in Ireland, we find, in the 8th year of Ed. III. a case in our books, where, a fine being levied by consent, the entry of the conusee was said to be *en auter droit* (d). Towards the close of that reign, we find another where the feoffees were sued by a petition to the king (e). In the 2d year of Richard II. there is a case in parliament, which

(a) Vid. ant. vol. II. 62.
Irish Statutes.

(b) Tempore Hen. VIII.
(d) 8 Ass.

(c) Vid. the
(e) Bro. Feof. al Use, 9.

fully shews the manner and circumstances of these gifts. It there appears, that Edward III. had infeoffed the duke of Lancaster and others in fee by deed, and caused livery of seisin to be made without any condition whatsoever. Long after, the king, by verbal declaration, prayed the feoffees, that they would, out of the lands, provide for the friars of Langley, and certain other religious persons. It was now demanded, in full parliament, of all the judges and king's serjeants, whether such subsequent charge to the feoffees should be adjudged by law a *condition*, and so make the feoffment *conditional*; and they were of opinion, that as nothing was said before, nor at the time of the gift, nor yet upon the livery, the king's request afterwards could not make a *condition* (a). Other examples there are, of such gifts, and a declaration to apply the produce of them to other purposes than the interest of feoffees, and they are invariably considered as *conditions*, and in that light and no other were pronounced to be good or bad (b).

Among these instances, to contest for the origin of uses is disputing for words. Whether they were called *conditional enfeoffments*, *entries en auter droit*, or the like, the thing was certainly understood before the time of Richard II. But the stat. 50 Edw. III. which says, that lands so collusively given should be liable to the execution of creditors, *if they took the profits*, by that phrase seems to come nearer to the proper idea of a *use*, as since understood, than any thing before in the annals of the law. The earliest mention of this kind of property, under the *name* of a *use*, is in the reign of Richard II. when there is the first evidence that the words *ad opus et usum* got into deeds and assurances of land (c). We also find in the statute of provisors, 7 Ric. II. cap. 12. the term *use*; and in the statute of mortmain, 15 Ric. II. c. 5. the possession of

(a) Cott. Abri. p. 169. § 26. (b) Ibid. p. 185. § 25, &c. (c) Bacon's Reading on the Statute of Uses.

land *to the use of another*, is spoken of in the same language that was ever after held on this subject.

An use, as now understood, was when a man infeoffed another to the use of himself, or of a third person: in this case, while the feoffee was seised of the land, the feoffor, or third person, was seised of the use. The motives for throwing property into this shape were many and powerful. A person conscious that his land was liable to forfeiture for any crime, or to the burthen of some legal charge, might rid himself of both by disposing of his land to another who was in a better condition than himself. In the mean time, by reserving to himself only the use of it, he had property that was not liable to the like hazard and incumbrance. This invention is by some attributed to the ecclesiastics, who practised it to evade the statute of mortmain. It might be argued, that the prohibition to take *land* was no prohibition to take *the use* of it: when, therefore, an alienation in mortmain was designed, it was advised to infeoff some person *to the use* of the religious persons intended to be benefited, who thereby became seised of the use. Whether the churchmen were the first who suggested the idea of dividing the profits from the land, it is certain that the term *use* (as far as we can judge from the statute book) was first applied to their transactions, as appears by the statutes before-mentioned concerning provisors and mortmain (*a*). If this was the origin of uses, many reasons concurred for adopting the device; reasons of more common and frequent application than alienations in mortmain. Besides those of forfeitures and legal liens, the power of devising a use by will, at a time when the owner had not the same power over his land, contributed, perhaps, more than any other consideration, to make this sort of property desirable.

This disposition of property, though a novelty in the law, was not incompatible with any known rule. If a

(a) Vid. ant. 162.

person seised of land might give it in one way, there was no reason why he might not give it in another. Conformably with such general principles of equity, these gifts, though not capable of being enforced by any common-law process, seemed, equally with many other questions, to deserve the cognisance of the supreme tribunal of the kingdom; and they were accordingly entertained by parliament on petition exhibited to the king. While uses were created merely as a mode of ordering property more suitable to the views of the owner than a conveyance at common law, they were intitled to the equitable consideration they received from the parliament. But we have just shewn, that they were resorted to for other purposes: a debtor, in the agony of some pressing occasion, would transfer his property in this manner, in order to avoid the process of the law. In such instances, *a use* became a fraudulent and collusive transaction; and the legislature provided a remedy against the effect of it by the statute 50 Ed. III. and the two statutes of this reign before mentioned (*a*). When *a use* was resorted to as a medium by which land could be conveyed to a religious house, it was transacted with more deliberation as well as more secrecy than in the former case; and the injury, if any, was more remote than that of withdrawing property from the immediate execution of creditors.

It was not therefore till the 15th year of this reign, that the legislature imposed any restraint upon such gifts; and then a statute of mortmain was made, adapted to this new modification of property. It was enacted (*b*), that all those who were possessed by feoffment, or other manner, *to the use* of religious people, or other spiritual persons, of lands and tenements, fees, advowsons, or any other manner of possession to amortise them, and whereof the said religious and spiritual persons *took the profits*, should cause them to be

(*a*) Vid. ant. vol. II. 401; and ant.

(*b*) Ch. 5.

amortised within a certain time by the licence of the king and lords, or else alien them to some other use; and all future purchases in that way were to be considered as within the statute of mortmain. Such was the progress of this new species of property, and this was all the notice that had hitherto been taken of it by the legislature.

The title to dower was considerably affected by a statute made in this reign concerning *ravishment* (which meant no more than what has since been called stealing) of women. The stat. 6 Ric. II. st. 1. c. 6. says, that the ravishment of ladies and the daughters of noblemen, and other women, in every part of the realm, was now more violent and more frequent than had formerly been. To take away part of the temptation to these outrages, it was enacted, that whenever such ladies, daughters, and other women, were ravished, and, after such rape, consented to the ravisher, both the ravisher and ravished should be *ipso facto* disabled from claiming any inheritance, dower, or joint-feoffment after the death of the husband, or ancestor; and that the next of blood to the ravisher or ravished should have title immediately after the rape to enter upon the ravisher or ravished, and hold the land. The husbands or fathers of such women might sue the ravishers, and have judgment of life and member, notwithstanding the women afterwards consented to such ravishers, and the defendant was not to be permitted to wage battel, but the truth was to be tried by the country.

We come now to such statutes as relate to ^{Judicature of} the administration of justice. The ^{the council.} judicature of the parliament, and even of the council, was exercised in all its amplitude, notwithstanding the attempts made in the last reign to draw all causes and questions from both, and particularly from the latter, to the decision of the common law (a). The statutes then made respecting the council,

(a) *Cott. Auct. p. 122. § 87.* (b) *Cott. Auct. p. 122. § 87.* (c) *Cott. Auct. p. 122. § 87.* (d) *Cott. Auct. p. 122. § 87.* (e) *Cott. Auct. p. 122. § 87.* (f) *Cott. Auct. p. 122. § 87.* (g) *Cott. Auct. p. 122. § 87.* (h) *Cott. Auct. p. 122. § 87.* (i) *Cott. Auct. p. 122. § 87.* (j) *Cott. Auct. p. 122. § 87.* (k) *Cott. Auct. p. 122. § 87.* (l) *Cott. Auct. p. 122. § 87.* (m) *Cott. Auct. p. 122. § 87.* (n) *Cott. Auct. p. 122. § 87.* (o) *Cott. Auct. p. 122. § 87.* (p) *Cott. Auct. p. 122. § 87.* (q) *Cott. Auct. p. 122. § 87.* (r) *Cott. Auct. p. 122. § 87.* (s) *Cott. Auct. p. 122. § 87.* (t) *Cott. Auct. p. 122. § 87.* (u) *Cott. Auct. p. 122. § 87.* (v) *Cott. Auct. p. 122. § 87.* (w) *Cott. Auct. p. 122. § 87.* (x) *Cott. Auct. p. 122. § 87.* (y) *Cott. Auct. p. 122. § 87.* (z) *Cott. Auct. p. 122. § 87.*

seem not to have been observed with much strictness ; for through the whole of this reign similar complaints were repeatedly preferred to parliament. In the first year of Richard II. it was prayed, that no suits between parties should be *ended* before any lords or others of the council, but before the justices only (*a*). In the following year it was prayed, that no man should answer before the council, by writ or otherwise, concerning his freehold, but only at the common law : to which it was answered, that no man should be *forced to answer finally* there, on such matters ; though all persons should be obliged to answer before the council concerning *oppressions* (*b*). Thus, a limit seemed to be fixed to the jurisdiction of the council, by allowing it to entertain all sorts of suits commenced originally there by complaint or otherwise ; but instead of determining *finally*, to refer them, as it should seem proper, according to the subject of debate, to the different courts of common law. This had been the practice in the last reign (*c*), and we find instances of it continually in this, in all sorts of questions that could arise upon property (*d*). Besides the business that would perpetually engage the council, when it acted in this manner, as ancillary to the judicial determinations of the courts of law, it was laid down by parliament, that *oppressions* might be determined there *finally* ; and in all times, particularly those of disorder and change, numberless are the causes which the council might draw to itself under the idea of *oppressions* ; many matters of dispute between man and man being liable to that construction.

For the dispatch of all this business, we have seen, that a regular standing council was established towards the close of the last reign, as a substitute for the council which the king had about him by the old constitution. The

(*a*) Cott. Abri. p. 162. § 87. (*b*) Ibid. p. 178. § 49. (*c*) Vid. ant. vol. II, 403. (*d*) Cott. Abri. p. 176. § 34, 35. *et passim*.

confirmation of this appointment was more than once prayed by the commons in this reign : they petitioned the king that he would discharge the great council of lords ; and appoint about him a standing council, consisting of the great officers, as the chancellor, treasurer, keeper of the privy seal, the chief chamberlain, the steward of the household, and the like (*a*). It should seem, that this was at length complied with, and that the summoning of the great council became less frequent ; while the standing council gradually assumed judicial powers of a very extensive nature, equal to those exercised by the great council of lords. Questions, both of a civil and criminal import, were brought before the council, as a regular part of the judicial establishment of the kingdom. Besides the original commencement of suits, the judges used to adjourn causes before the council, if any doubt or difficulty occurred, as they used in former reigns to adjourn them into parliament (*b*). Probably the appointment directed to be made by stat. 14 Ed. III. of certain lords and bishops to decide such adjourned causes, was not kept up ; and such inquiries being therefore excluded from the parliament, the council was the only superior court that remained for judicial information of that sort (*c*). It was not this part of the jurisdiction of the council, but the former, that continued to raise jealousies. These at length occasioned the following stat. 17 Ric. II. c. 6. for the suppression at least of all *false* suggestions : the chancellor was thereby authorised, upon any suggestion being found, and proved untrue, to award damages according to his discretion to the person injured.

The parliament still continued to determine Of the parliament.
causes brought before them upon petition, as in

(*a*) Cott. Abri. p. 183. § 12. 3 Ric. II. (*b*) Vid. ant. vol. II. 412, 413.

(*c*) Cott. Abri. p. 282. § 17.

the former reign, while their criminal judicature maintained all the authority it ever possessed. Indeed, there is no period of our history in which the criminal judicature of parliament was called forth into action so frequently; nor was this confined to the persons of peers, but commoners were equally subject to this supreme court, notwithstanding the protestation of the lords at the beginning of the former reign (*a*). The modes of proceeding being various, and none of them quite consonant to our present ideas upon this subject, it may be acceptable to the reader to give a sort of report of some trials of this kind.

To begin with the inquiry instituted against *Alice Piers*: This lady was brought before the lords, where Sir Richard Le Scrope, steward of the household, at the command of the prelates and lords, recited in her presence an ordinance, which it seems had been made in the 50th Ed. III. declaring, that no woman, especially *Alice Piers*, should prosecute any thing in the king's court by way of maintenance, under penalty of forfeiture, and banishment out of the kingdom. The steward informed the lords, that she had incurred this penalty, and, to support the charge, mentioned two instances where she had used her intercession with the late king, respecting some appointment in the state. The facts adduced seem hardly within the meaning of the ordinance: however, they were held breaches of it; and accordingly, without calling any witness to prove what had been alleged, he demanded of her what she could say to clear herself. She said, she was not guilty, and offered to produce witnesses who would disprove the charge. A day was assigned for the examination of these witnesses; when, after they had deposed upon oath what they knew of the transaction, twelve other persons were called in, who were most of them witnesses, says Tyrrel; and they,

(*a*) Vid. ant. vol. II. 412, 413.

in the nature of a jury or inquest, being sworn, and charged to speak the truth, whether the said Alice was guilty or not, found her guilty (*a*). This was a mixed and very singular proceeding. It was the trial of a commoner before the lords, by the verdict of a jury. This, though warranted by a similar proceeding in the former reign (*b*), appears more singular than the putting her upon her defence, without calling a witness to prove the charge.

The method of prosecuting by impeachment, which had been first exercised against the lord Latimer in the last reign, was pursued in the reign of Richard II. In the 10th year of this king, an impeachment was preferred against the chancellor Michael de la Pole, at the instigation of the duke of Gloucester, who at that time had the house of commons at his devotion. In the 20th of the same reign, the commons impeached the archbishop of Canterbury.

There was a fierceness discoverable in all the proceedings of Gloucester, and the confederate lords, against the king's favourites; yet as some of these purport to be judicial inquiries, they must be taken as specimens of proceeding in criminal prosecutions, and as such deserve our notice. When the five lords appealed the archbishop of York, the duke of Ireland, Michael de la Pole earl of Suffolk, Robert Trésilian, and Sir Nicholas Bramber, of high-treason, they offered to prove their accusation in the old way; they threw down their gloves, protesting on their oaths to prosecute the charge by battel: but the king referred it to the next parliament, and there it was resolved that battel lay not in that case. Afterwards, articles were exhibited in writing to the number of thirty-nine, in many of which those persons were charged with accroaching royal power: the accused were summoned, but not

(*a*) Tyrr, Hist, vol. III. 834.

(*b*) Vid. ant. vol. II. 413.

appearing, their default was recorded: the judgment, however, was deferred till the king and lords had advised upon the articles (a).

In the mean time the judges, serjeants, and others, learned in the common and civil law, were directed to advise the lords how to proceed in this appeal (b). Their answer to the lords was, that the appeal was not made, nor brought, *as the one law or the other required*. Upon this answer the lords entered into deliberation, and then declared, that in so high a crime as that laid in this appeal, which touched the person of the king and the estates of the realm, and was perpetrated by persons who were peers, as well as by others, the cause could not be tried any where but in parliament, nor by any law but that of parliament; and that it should be done in this case by the assent of the king, by the award of parliament; since the process of inferior courts was only as they were intrusted with the execution of the ancient laws and customs of the realm, and the ordinances and establishments of parliament; and they declared that this appeal was well brought.

Accordingly, upon the default of the first four defendants, they were adjudged guilty of the treasons and other crimes in the accusation charged. Sir Nicholas Bramber, being the only one of them in custody, was brought before the lords: he there waged his battel, which was refused him; and though the lords said they would take due care by all ways to inform their consciences of the matter of the accusation, there seems to have been nothing stated by way of proof. It is indeed said, that divers companies came from London to *aggravate* the charge; but this sounds more like a popular clamour than an examination of legal evidence. However, upon this, the

(a) Stat. Tri. vol. I. 5.

(b) Ibid. 11.

knight, not having an answer to make, was adjudged guilty, as were all the others.

As this prosecution was called an appeal, and under that name assumed the pretence of a legal proceeding, we are more struck with any irregularity in it, particularly with the decisive manner in which the lords over-ruled all attempts to reduce it to the order of the common law. The impeachment exhibited by the commons against the judges, being a prosecution *entirely* parliamentary, was more unquestionably, according to the opinion just given by the lords, exempt from the rules of the common law, and to be judged of only by the law of parliament; a distinction which, we find, in those days made some difference as to the probability of the party being acquitted or convicted.

The proceedings against the judges must therefore be explained by the parliamentary law of those times. They were all, except *Skipwith* and *Tresilian* (a), arrested upon their seats in Westminster-hall, on a charge of high-treason, in giving answers to questions propounded to them by the king; which questions tended to calumniate and destroy the supreme authority that had been conferred on certain lords by commission from the king, and confirmed in parliament. They were all adjudged guilty of treason, and, though their lives were spared, they were obliged to submit to banishment (b).

Thus much of these famous proceedings against Richard's favourites and ministers. During the same reign, there were other prosecutions of great men, which serve to illustrate the criminal proceedings of parliament in those times.

The appeal brought against Richard's old enemies,

(a) Stat. Tri. vol. I. 5.

(b) Ibid. vol. I. 14.

Gloucester, Arundel, and Warwick, is related in this manner: In the great hall of Nottingham castle, the king then sitting with the crown on his head, seven lords appeared, who exhibited a bill of appeal of treason: this was read, and then, by the advice of the lords, and those of the council about the king, the lords accused had a day given them to appear in the next parliament. The principal charge against these lords was, *the accroaching of royal power*, in the transaction which happened in the 10th of Richard II. and is to be found in all the histories of those times. Of these offenders, Gloucester was murdered abroad, and the other two pleaded the king's pardon; which plea was over-ruled, because the pardons had been avoided by a late statute; sentence, therefore, was passed upon them, at the prayer of the appellants, without proving the charge: the sentence was pronounced by the duke of Lancaster, lord steward, by the command of the king, the lords temporal, and the *procurators* for the prelates and clergy; an appointment which had been devised just about this time.

Appeal against
the duke of
Norfolk.

The appeal between the dukes of Hereford and Norfolk is the most singular judicial proceeding (if it can be called one) within this period. In the 21st of Richard II. the day before the parliament ended, the duke of Hereford came before the king, and presented him with a schedule, containing the substance of an accusation, of which he had before given the king some intimation, against the duke of Norfolk: it related to some disrespectful words spoken by that nobleman against the king's person and government (a). This being read before the king and lords, the next day (being the last of the parliament) it was ordained by the king, with the assent of the estates, that this matter should

(a) Tyrr. vol. III. 984.

be determined by the advice and discretion of the king, and the committee which had already been appointed by the parliament to represent the legislature, with all its authority, and to continue to dispatch such matters as were left unfinished by the parliament.

Afterwards the king and the committee agreed, that the matter should be determined by the law of chivalry, if other sufficient evidence or proof could not be found for ending it by the ordinary course of law. Accordingly, as the one persisted in maintaining his assertion, and the other in denying the charge, and no proofs were brought, it was remitted by the above authority to be decided by single combat at Coventry. There the two lords met, with all necessary formality, the king and the committee attending. Every thing was arranged, the ceremonial was adjusted by the constable and marshal, and the combatants were spurring on to the attack, when the king put a stop to the engagement, ordered them to be disarmed, and, retiring for two hours to the committee to consider of some expedient to prevent the effusion of blood, the following sentence was at length pronounced: "That the king, by the advice of his council, to avoid the shedding of blood, had decreed, that, instead of fighting, the defendant should be banished for life, and the appellant for ten years(a)."

This unexpected sentence, to get rid of a mode of proceeding not now much favoured, was considered as the judgment of the whole parliament; the committee, who represented the lords, being assisting to the king at the trial. However, that this singular sentence might not be questioned hereafter, it was solemnly ordained by the committee, that whoever attempted to reverse any of those acts of the king, so done with the assent of the committee, should be deemed a traitor; and to make every thing sure,

(a) Tyrr, vol. III. 986 to 988.

an oath was exacted of every lord for the observance of them. From the foregoing relations may be formed an idea of the criminal law of this period, when administered by the supreme judicature of the kingdom.

Origin of the
court of equity
in chancery.

The court of chancery has hitherto been spoken of in no other light than as a common-law court; except when causes were referred thither, either by the parliament or council, and were there finally determined; which determination was not usually made by the chancellor alone, but by a sort of committee of the council, who frequently adjourned thither for that purpose. It has been a received opinion, that the chancellor began, in this reign, to enlarge his judicial authority, by entertaining suits not cognisable at common law; and that he thus gave rise to the *court of equity*, which has since become the principal object of the chancellor's attention, so as to eclipse the jurisdiction belonging to his ancient court of common law.

We have seen in the reign of Edward III. (a) what steps the legislature had taken to preclude suitors from making application to the king in council. By these means, while questions of common law went to the courts of common law, equitable obligations, which made another branch of the jurisdiction of the council, were, in some degree, left only to the conscience of men to fulfil, without a tribunal to give them effect. A state of judicial polity like this, was extremely defective; and it became expedient, from considerations highly concerning the justice of the kingdom, that an authority should reside somewhere, to mitigate the rigour and supply the inefficacy of proceedings at common law.

In the distribution of judicature, tribunals were established for the administration of right, which were guided in their procedure and judgment by a settled form of things

(a) Vid. ant. vol. II. 418.

calculated for the ordinary course of redress, and conceived to meet the common instances of wrong and injury. To preserve regularity and ease in business, such forms were adhered to, and proceedings upon them became precedents for future cases. But this system, founded on the known custom and written laws of the kingdom, was inadequate to the purposes of universal justice. There still remained many injuries to property against which the common law did not relieve, and many wrongs which an adherence to the letter of the law would only confirm and aggravate. To do complete and substantial justice, it was seen, that something besides *law* must be administered; something that would supply its defects, and yet not contravene its rules; by which justice might be upheld without intrenching on the established order of judicature.

Innumerable are the instances in which such an authority was wanting. It will be sufficient to consider only the following: When a person was to found a claim by virtue of a deed which was detained in the hands of another, so that he was prevented from making a regular profert of it, he was thereby utterly deprived of the means of obtaining justice according to the forms of law: If a deed of grant of rent, common, or annuity were lost, as these claims could only be substantiated by the evidence of a deed, they vanished together with it: If a person had neglected to take, or had lost an acquittance for money paid; in an action of debt on a specialty, the defendant could not discharge himself on the plea of *nil debet*; because it was a rule of law, that a deed could only be dissolved by some instrument of as high authority. All these cases were rendered harder by another rule of law, that a party to a suit should not be obliged to answer questions relating to the matter in dispute; in consequence of which that light which could be derived only from an examination of the persons concerned, was quite shut out.

It was highly reasonable, that some remedy should be applied in these and the like defects of law, or the judicature of the kingdom would have been incomplete. The resort in such cases had been to the king in council, in whom resided every thing respecting law and justice that was not declared by any known rule, or not distributed among some of the judicial departments. But it will now be seen, that the consideration of such matters passed from that supreme tribunal to the chancellor.

This great officer, standing in an immediate and confidential relation to the king's person and service, was the principal of those counsellors who assisted by their advice in deliberating on such matters as were brought before the council by petition. From an adviser, it was natural, that in length of time his high rank and knowledge might constitute him almost the sole judge; and filling already a department that made him the first spring in the administration of justice, as he framed original writs, by which alone justice was to be obtained; and being already in the exercise of a considerable judicial office, in determining on the expediency of the king's grants and patents; it was obvious, when petitions of this kind increased, to delegate the consideration of them to the chancellor, who, in quality of a learned and pious ecclesiastic, might safely be trusted for a conscientious discharge of this important duty.

It was not unlikely, that the frequent reference to the chancellor in these cases might lead to a shorter course of redress; and that the chancellor might be petitioned, in the first instance, to grant that relief, which, it was foreseen, he would have to direct upon a reference for that purpose being made to him by the council, had the petition been originally there. It is probable, that after the jurisdiction of the council was restricted by the statutes made in the last reign, it became the practice, if it had not been so before,

to address petitions and bills of complaint to the chancellor himself (a).

Even the ordinary common-law business of the chancellor carried in it some appearance of a court of equity. The holding of pleas concerning the king's grants, and determining on their validity from considerations of policy and fitness; the exercising a kind of guardianship over the estates and persons of such of the king's subjects who were not able to protect themselves, as ideots and lunatics; this was a scope of judicature not like that of any other court of common law. Less clamour was likely to be raised by those who were jealous for the common law, when they observed the equitable judicature of the council exercised by a judge like this, who was already of high rank and authority in an ancient judicial department, and whose jurisdiction was already of a nature somewhat similar.

There was another part of the chancellor's office which afforded an opening to an innovation like this. The permission given to the chancellor by stat. Westm. 2d. to frame writs *in consimili casu* had enlarged to so great an extent his remedial authority, that every sort of relief seemed within his jurisdiction. When he had gone as far as the analogy of the common law would allow in forming writs of a liberal conception, he might think it inconsistent with his office to dismiss any one from the chancery without relief of some kind; and he might venture, in his own court, to entertain and decide such matters of an equitable nature, as he foresaw it would be in vain to send to the courts of common law. Whatever were the grounds the chancellor rested his jurisdiction upon, it is evident that he had begun, about this time, to exercise certain judicial powers of a new and equitable kind, unknown to the ancient courts of the realm. The fixing the chancery at

(a) The stat. of Henry VII. for new-modelling the Star-chamber, directs that bills or informations should be put to the chancellor *for the king*. Stat. 3 Hen. VII, c. 1.

Westminster, about the 4th of Edward III. might contribute to establish the chancellor in these new powers, as he became by his residence there more accessible at all seasons.

It is said that John Waltham (*a*), bishop of Salisbury, who was keeper of the rolls about the 5th of Richard II. considerably enlarged this new jurisdiction; that, to give efficacy to it, he invented, or, more properly, was the first who adopted in that court, the writ of *subpœna*; a process which had before been used by the council, and is very plainly alluded to in the statutes of the last reign, though not under that name (*b*). This writ summoned the party to appear under a penalty, and answer such things as should be objected against him: upon this a petition was lodged, containing the articles of complaint to which he was then compelled to answer. These articles used to contain suggestions of injuries suffered, for which no remedy was to be had in the courts of common law, and therefore the complainant prayed advice and relief of the chancellor.

Some have attributed the origin of this court of equity to Cardinal *Beaufort*, the son of John of Gaunt, who was bishop of Winchester in the reign of Henry V. It is an opinion also (*c*), that the chancellor assumed his extraordinary judicature in order to be in a situation to favour the avarice of the churchmen. Uses, contrived first by the clergy, it is said, with a view to enrich them in defiance of the statute of mortmain, were of a new impression, and entirely out of the rules of the common law. A person *seised* of a use had no means of obtaining the execution of it, but the conscience and honour of the feoffee. To give effect to these dispositions, the chancellor, who was himself an ecclesiastic, applied, it is said, this new writ of

(*a*) So it appears from Rot. Parl. 3 Hen. V. (*b*) Vid. ant. vol. II. 419.

(*c*) Gilb. For. Rom. 17.

subpæna, to compel a feoffee to answer before him respecting such trust; and, upon the truth of the matter appearing, he would decree such execution of the use as the feoffee was bound in conscience to make. This is suggested by some writers as the occasion on which the court of chancery first exercised its *equitable* jurisdiction.

After what has been before observed, it will not be easily credited that this was the origin of the court of equity. Yet it is not at all improbable that such motives might have induced clerical chancellors to entertain suits of that kind with great readiness; and that the frequency of them might have brought the court into such a sudden repute, as would have very much the appearance of an entire new creation. The consequence was, that later times have dated the birth of the equitable jurisdiction in chancery, from the period when it grew into more notice by the accession of this new subject of litigation.

The chancellor was not suffered to continue increasing this new authority unnoticed or unmolested. He was watched by the legislature, and such checks were occasionally applied, as were thought necessary to keep it within just bounds. In the 13th Richard II. (a) the commons petitioned the king, that the chancellor might make no order against the common law; and that no judgment should be given without due process of law. In another petition they prayed, that no one should appear before the chancellor, where recovery was given by the common law; to both which the king's answers were to the like effect, that it should continue as the usage had been heretofore. These applications to the king carry in them an admission, that such a power of judicature did reside in the chancellor, so long as he did not determine against the common law, nor interpose where it furnished a remedy; and the answer as clearly demonstrates, that such an au-

(a) Rot. Parl. 13 Ric. II. 347 (a)

thority residing somewhere, was recognised by the usage and constitution of the realm.

But the stat. 17 Ric. II. c. 6. (before mentioned) recognises this new judicature in the most explicit terms, and, by coupling it with the council, seems to intimate its origin to have been as we have just supposed. This statute recites, that people were compelled to come before the king's council, or in the chancery, by writs grounded on untrue suggestions; and on that account it enacts, that the chancellor, presently after such suggestions were duly proved untrue, should have power to award damages, according to his discretion, to the person so grieved. This statute seems to give the first testimony to the legitimate authority of this court, and may be considered as a legislative sanction to its establishment; for after this it enlarged its judicature with great freedom.

Court of the
constable and
marshal.
Besides the court of equity in chancery, two other new jurisdictions had lately grown into notice; that of the *constable* and *marshal*, and that of the *admiral*. Of these, there is very little notice before this king's reign. The former is mentioned in a report-book of the last reign, as a court (*a*) which was to decide upon contracts made in martial affairs. We hear no more of this court till the 2d of Richard II. when the commons petitioned that the constable and marshal might surcease from holding plea of treason or felony, which should be determined only before the king's justices. It seems, the heirs to whom these two offices had descended being then within age, they and the offices were in the custody of the king; and for this reason the parliament refrained from making any alteration in this new tribunal (*b*). The objection to this court was, that it was governed by *the law of arms*, and not by the general custom of the kingdom; and at a second meeting of this same parliament,

(*a*) Vid. ant. 62.

(*b*) Cott. Abri. p. 171. § 47.

it was stated by the bishop of St. David's, who happened to make the usual speech at the opening of the parliament, as a grievance, that the law of arms and the law of the land did not concur (*a*). To quiet the minds of the people upon this subject, a statute was at length made; but this was so general, that it left things in the same state they were in before. It was noticed by stat. 8 Ric. II. c. 5. that divers pleas concerning the common law, and which ought to be examined and discussed by that law, were now of late (*b*) drawn before the constable and marshal of England, to the great damage and disquiet of the people; and it was therefore declared and ordained, that such pleas and suits should not be brought in that court, but this matter should stand as it did in the time of Edward the Third. This seems to be calculated for satisfying the present discontent of the people, without disturbing things, till the office was out of the wardship of the king; but in the 13th year of this reign (when probably that event had taken place) an act of a more special nature was made, which seems to define the authority of that court very exactly. Considering the daily encroachments made by the court of the constable and marshal, in holding plea of contracts, covenants, trespasses, debts, detinues, and other matters cognisable at common law, it was intended by stat. 13 Ric. II. stat. 1. c. 2. to make a declaration of the jurisdiction of the constable (for the act does not in this place name the marshal) in the following way: "To the constable," says the act, "belongs the cognisance of contracts touching deeds of arms, and of war out of the realm, and also of things which touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters appertaining, which other constables before that time had duly and reasonably used." It was also ordained, that every plaintiff

(*a*) Cott. Abri. p. 173. § 8.

(*b*) *Jam de novo.*

should declare plainly his matter in his petition, before any one should be sent to answer thereto; and if any would complain that a plea was commenced before the constable and marshal which might be tried by the common law, he might have a privy seal of the king without difficulty, directed to the constable and marshal, to surcease in the plea, till it was discussed before the king's council, whether the matter belonged to the common law, or to that court.

The marshal, who was joined with the constable in the presidency of this court, filled a different office from him, who was associated with the steward; though it was not uncommon for them both to be held by the same person, as well as other offices which likewise conferred the title of marshal. This appears from a transaction in the 20th year of this reign; for the king granted to the earl of Nottingham, and to the heirs male of his body, the office, name, and title of earl marshal of England, the office of marshal of the king's bench and exchequer, the office of proclaimer marshal, and of the steward and marshal of the king's household (*a*).

While the Crown was in possession of territories on the continent, as during the latter part of Edward III. and the reigns of Richard II. and the two Henrys, there must have been great employment for this court, notwithstanding the fiction (*b*) that had been devised in the time of Edward III. to make matters arising beyond sea cognisable by a jury from an English county. We shall also find there was conferred on these two officers a criminal jurisdiction, by which they tried crimes committed beyond sea; and this they exercised so low down as the reign of queen Elizabeth, though it was in part rendered less necessary by the statute of Henry VIII. for trying treason committed beyond sea.

(*a*) Cott. Abri. p. 363. § 32.

(*b*) Vid. ant. 62.

The office of admiral is considered by the French as a piece of state invented by them; ^{Of the admiral.} nor does it appear that any officer of this kind was constituted in England till about the time of Edward I. and from thence the place of high admiral had been conferred on some of the first nobility. We have yet met with nothing concerning the judicial authority of this officer; but in this reign there had arisen a like jealousy of his authority, as of that of the constable and marshal. It was the port-towns, which had franchises of their own, that raised most of the complaints against the admiral (*a*). To satisfy them, an act was at last made, in the 13th year of the king. The preamble of this act (*b*) states the complaints as arising, because admirals and their deputies held their sessions within divers places of the realm, as well within franchises as without, *accroaching* to them greater authority than belonged to their office, to the prejudice of the king, and of persons possessed of franchises: to remedy which it was declared, that the admiral or his deputies should not meddle with any thing done within the realm, but only with things done upon the sea, as had been used in the time of Edward III.

This, like the first act about the jurisdiction of the constable and marshal, was too general to have any effect in working a reformation. It was therefore soon followed by stat. 15 Ric. II. c. 3. where the admiral's jurisdiction was more particularly marked out. First, it was declared, that of all manner of contracts, pleas, and quarrels, and all other things arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the admiral's court should have no manner of cognisance or power; but these were to be determined by the common law. Nevertheless, the admiral was to have cognisance of the death of a man, and of a mayhem done in great ships,

(*a*) Cott. Abri. p. 339. § 33.

(*b*) Ch. 5.

being and hovering in the main stream of great rivers, only below the *bridges* (a) of the same rivers near the sea, and in no other places of the same rivers. It was further ordained, that he should have power to arrest ships in the great fleets for the great voyages of the king, and of the realm, saving to the king all manner of forfeitures and profits thence arising: he was also to have jurisdiction on such fleets during such voyages, saving also to lords, cities, and boroughs, their liberties and franchises.

It may be asked, By what law was the court of the constable and marshal, and that of the admiral, governed? It has been said by later writers, that the proceeding in the former was a course directed by the civil law (b); but *the law of arms* was surely not to be found in the volumes of Imperial jurisprudence. The laws of *Oleron*, as they were called, might constitute a national code of maritime law, for the direction of the admiral; and whatever was defective therein was supplied from that great fountain of jurisprudence, the civil law, which was generally adopted to fill up the chasms that appeared in any of the municipal customs of modern European nations.

It should seem, that the old laws (c) respecting the bounds of the steward and marshal's court were not observed; for in the beginning of this reign, the commons petitioned, that the jurisdiction of the marshal might be limited, and that all persons within the verge might have their liberties (d): and it was enacted by stat. 13 Ric. II. c. 3. that the jurisdiction of the court of the steward and marshal of the king's house should not pass the space of twelve miles, to be reckoned from the king's lodging; which was conformable with some petitions in the former reign (e). After this there

(a) *Paraval les pointz*. In the Old Abridgment it is *portes*; in Pickering it is *bridges*; in the *Nova Statuta* it is *pointz*.

(b) Duck de Auth. Jur. Civil. 336. 340.

(c) Vid. ant. vol. II. 235.

(d) Cott. Abri. p. 160. § 65.

(e) Vid. ant. vol. II. 420, 421.

were no further parliamentary declarations on the subject of this court, except a short act in the reign of Henry VI.

Having said thus much upon these courts of Court of ex-
chequer. a particular and special nature, we come now to the ordinary courts of law, respecting which some regulations, well deserving of notice, were made by parliament. Great complaint was made of the dilatory and oppressive course of the court of exchequer; where, in addition to the rigour which was experienced from the natural order of things, the clerks practised many unfair devices upon accountants. Among other hardships, the heirs and executors of persons who had accounted at the exchequer, were not allowed to plead the discharge of their ancestor or testator, without a writ or privy seal authorizing them so to do. By this act the necessity of such writs was removed; all persons were admitted to plead as in other courts; heavy penalties and imprisonments were inflicted on clerks who issued process to recover debts already paid. Besides this, the business of the exchequer, as far as concerned the king's revenue, was better regulated by several acts of parliament (a). It seems, as the court of exchequer was not within the act of *nisi prius*, whenever an issue in a foreign county was to be tried, a special commission used to be made out: it was now enacted, that no more than two shillings should be given for such commission, as the clerk's fee for making it out; and the same for the record of *nisi prius*, with the writ (b). The people were not satisfied with the course of appeal established from this court by the statute of the last reign (c); but it was again prayed (though without effect) by the commons, that errors in the exchequer might be redressed in the king's bench or parliament (d).

The substance of the oath which had been ordained by stat. 18 Ed. III. st. 4. to be taken by the judges and barons,

(a) Stat. 1 Ric. II. c. 5. stat. 5 Ric. II. c. 9. 11, 12; 13, 14, 15. (b) Stat. 5 Ric. II. c. 16. (c) Vid. ant. vol. II. 423. (d) Cott. Abri. p. 164. § 105.

was put into a statute in the 8th year of this king (a). This act ordains, that they should not take any robe, fee, pension, gift, or reward of any but of the king, except reward of meat or drink, which should be of no great value: they were to give no counsel to any in matters where the king was party, or where the king was any ways concerned; nor were they to be counsel with any man in any cause or matter depending before them, upon pain of losing their office, and making fine to the king. It was one of the charges against the archbishop of York, *Robert de Vere*, and *Michael de la Pole*, that they on many occasions tampered with the judges; and those suspicions might have produced the above act. But, whatever was the motive for making it, we find it was repealed the next year by stat. 9 Ric. II. c. 1. *because IT WAS VERY HARD, and needed declaration*. It was by another chapter (b) of the former statute enacted, that if any judge or clerk was convicted before the king and council of false entering of pleas, razing of rolls, and changing of verdicts, to the disherison of either of the parties to the suit, he should be punished at the discretion of the council. To prevent the possibility of partiality or favour in magistrates, it was ordained by the same act (c), that no *man of law* should be justice of assise, or of the common deliverance of gaols, in his own county. This prohibition was confined to such persons in the commission as were men of the law, because the persons associated with them were, by some former statutes, expressly required to be persons of the county.

Further regulations were made concerning these provincial judicatures. By the last mentioned act it was ordained, that the chief justice of the common bench should be assigned among others to take assises and deliver gaols; but that, as to the chief justice of the king's bench, it should

(a) Ch. 3.

(b) Ch. 4.

(c) Ch. 2.

be as had been for the most part the last hundred years. What the practice had been for the preceding hundred years does not appear by any statute, report, or book ; but it should at least seem from this act, that the chief justice of the common bench did not use to go circuits. By stat. 20 Ric. II. c. 3. it was enacted, that no lord, nor other of the country, little or great, should sit upon the bench with the justices to take assises in their sessions, upon pain of great forfeiture to the king ; and the statute says, the king had charged the justices not to suffer this order to be broken. This, like some of the former laws, must have been occasioned by late discoveries of the interference and sway of great men in judicial matters. It was ordained by stat. 6 Ric. II. st. 1. c. 5. that justices of assise and gaol delivery should hold their sessions in the principal and chief towns of every county where the shire-courts were held ; but in stat. 11 Ric. II. c. 11. this was said to be found in part prejudicial and grievous to the people in many counties ; and on that account the chancellor was thereby empowered to remedy it by the advice of the justices, when occasion required.

The delays in suing writs of *nisi prius* still continued(a). Complaint was made, that persons were impannelled on juries, and after that, the parties would not sue their writ of *nisi prius*, but delayed it from year to year ; by which it was said jurors suffered great loss, sometimes to more than the yearly value of their land. To remedy this, it was enacted by stat. 7 Ric. II. c. 7. that in all pleas where a *nisi prius* might be had of course, after the grand distress thrice returned, and served before the justices against the jurors, and thereupon the parties demanded, if none of such parties would sue the writ of *nisi prius*, then it might be made at the suit of any of the jurors present ; and this might be in the exchequer as well as the other courts.

(a) Vid. ant. vol. II. 431.

Very little was done towards adding to or improving the remedies formerly in use. By stat. 7 Ric. II. c. 10. it was ordained, that an assise of novel disseisin for rent due out of tenements in divers counties should be had *in confinio comitatûs* within which the tenements lay, in the same manner as had before been used where a common of pasture in one county was appendant to land in another (a).

The statutes of *forcible entries* had a more extensive effect, by abrogating the old method of redress in cases of disseisin. We have seen, that in the time of Bracton (b) a person disseised might recover seisin by force, with a multitude of friends to assist him, provided he made this attempt *flagrante disseisinâ*. But the state of things was so altered, and the ideas of men were so different, that these forcible vindications of a man's property were thought incompatible with a well-ordered government. It was accordingly enacted by stat. 5 Ric. II. c. 7. that none should enter lands and tenements but where an entry was given by the law; and in such case, not with strong hand, nor with multitude of people, but only in a peaceable and easy manner; and if any one did the contrary, and was thereof convicted, he was to be imprisoned and ransomed at the king's pleasure. Thus a disseisee, if he entered with force, became punishable in the same manner as a disseisor with force had been before.

A more summary method was pointed out by stat. 15 Ric. II. c. 2. which directs, that upon complaint made to any justice of peace of such forcible entry, such justice should take sufficient power of the county, and go to the place where the force was; and if he found any persons holding the place forcibly after such entry made, they were to be taken and committed to the next gaol, there to remain convict by the record of the justice, until they had made fine and ransom to the king. The sheriff and all the

(a) Vid. ant. 111. (b) Vid. ant. vol. I. 322.

people of the county were thereby required to attend the justices. The same of forcible entries into benefices, or offices of holy church.

In order that those in reversion might not be losers by the collusion of the particular tenants, the following statute was made. It was enacted by stat. 9 Ric. II. c. 3. that if a tenant for term of life, tenant in dower, tenant by the courtesy, or tenant in tail after possibility of issue extinct, was impleaded, and pleaded to an inquest, and lost by verdict, or by default, or in any other manner, he to whom the reversion of such tenements belonged, his heirs and successors, should have an action by writ of attain, or by writ of error, as well in the life of such tenants as after their deaths; and if he succeeded in such writ, the tenant who lost should be restored to his possession, with the issues arising in the mean time, and the party suing, to the arrears of the rent, if any were due; and if the tenant were dead, then to the land in question. Moreover, although the particular tenant was alive, yet if the reversioner so suing alleged that he was of covin and consent with the demandant who recovered against him, the tenements were to be restored to the reversioner. The tenant, however, might afterwards have a *scire facias* out of the judgment so reversed, if he would traverse the covin alleged. This was a redress similar to that which had been allowed to termors for years, by a statute of Edward I (a).

Another way in which the particular tenant could injure the reversioner, was by making *default*, if impleaded for the freehold: in such case the reversioner was entitled by a statute of Edward I. (b) to be received to defend the right; but there was no remedy where he *pleaded in chief* such pleas by which he knew the inheritance must be lost. To remedy this, it was now enacted, by

(a) Vid. ant. vol. II. 150.

(b) Vid. ant. vol. II. 191. 228.

stat. 13 Ric. II. st. 1. c. 17. that where any of the before-mentioned tenants were impleaded, and he in reversion came into court and prayed to be received to defend his right, at the day the tenant pleaded to the action, or before; he should be received to plead in chief to the action, without making any delay by voucher, aid-prayer, nonage, or other delay, by essoin or protection.

The laying the venue in personal actions, which before had been almost optional (*a*), was somewhat restricted by stat. 6 Ric. II. st. 1. c. 2. It is thereby provided, that in actions of debt, accompt, and *all other such actions*, if the declaration stated the contract to be in any other county than that contained in the original writ, the writ should be immediately abated. It was ordained by ch. 3. of the same statute, that the writs of nuisance, commonly called *vicontiel* (*b*), might be brought, either in the old way, or else in the nature of assises determinable before the justices of the one bench or the other, or of assise to be taken in the country; so that the distinction between these writs, so much attended to in the last reign, began to be of less moment. It was a doubt in the last reign, whether the question of a priory being donative or not, should be tried *per proves*, or *per pais* (*c*). But it was now ordained, by stat. 9 Ric. II. c. 4. that such an issue should be tried by the certificate of the ordinary of the place; and this was to be, as well where the ordinary was not a party, as where he was. Notwithstanding the precaution taken by the legislature in making stat. 25 Ed. III. st. 3. c. 3. (*d*) yet the king's presentees, either by the favour of ordinaries, the partiality of inquests, or perhaps by the parties not being duly warned, would get themselves forced into benefices, and the incumbents put out. To remedy this, it was now provided, in addition to the course there directed, that

(*a*) Vid. ant. 112. (*b*) Vid. ant. 27. (*c*) Vid. ant. 100. (*d*) Vid. ant. vol. II, 378.

where a benefice was full of an incumbent, the king's presentee should not be received till the king had recovered by process of law ; and if any was received otherwise, and the incumbent put out, he was to commence his suit within a year after the induction of the king's presentee.

It was held in the time of Edward III. that (a) a prisoner in custody upon a judgment, should not be suffered to go at large without the consent of the plaintiff ; but it was now complained, that such persons were frequently let at large by the warden of the Fleet-prison, sometimes by mainprise or by bail, and sometimes without any mainprise, with a *baston* (b) of the *Fleet*: that such persons went into the country about their private affairs, continuing out many nights and days without the consent of, or any satisfaction made to, their plaintiffs. To prevent this, it was enacted by stat. 1 Ric. II. c. 12. that no warden of the *Fleet*, upon pain of losing his office, should suffer a prisoner by judgment to go out in any of the above ways, without making gree to the parties at whose suit he was there, unless it was by writ or other commandment of the king ; and if he was attainted of such neglect by due process, the plaintiff might have recovery against him by writ of debt. It was usual, when an action was commenced in another court against a prisoner, for him to be removed into the prison of that court : this had been abused in a way that caused the following provision, declaring, that if any prisoner in execution in another prison, would confess himself voluntarily, and by a feigned cause, debtor to the king, and by such means to be judged to the *Fleet*, there to have *greater sweet of prison* than elsewhere, and so delayed the party of his recovery, the recognisance so confessed should be taken as a true one ; so that the party being remanded to his first prison till he had satisfied his

(a) Vid. ant. 115.

(b) That is, an under-keeper of the gaol having a *baston*, or wand, and walking with the prisoner.

first plaintiff, should then be brought back to the *Fleet*, and there detained till he had satisfied the recognisance.

Two laws were made to correct the abuse of *protections*; a species of privilege which created great obstacles to the course of justice. We have seen (*a*), that some protections had the clause of *volumus*, and some that of *nolumus*: we now find, that as the clause of *volumus* was usually accompanied with the clause of *quia profecturus*, simply alleging that the party was going abroad; so other protections had in them a clause *quia moraturus*, signifying that he was to reside abroad. By stat. 1 Ric. II. c. 8. it was enacted, that no protection with a clause of *volumus* should be allowed before any judge, for victuals taken or bought upon the voyage or service of which the protection made mention, nor in pleas of trespass, or of other contracts, since the date of the protection. It was not uncommon to purchase these protections, both with a clause of *volumus* and of *quia profecturus*, after a plea was actually commenced, merely to delay the proceedings, without any regard to the king's service, in which the parties pretended to be employed; for they in the mean time continued to stay at home. This misapplication of protections occasioned the following act, 13 Ric. II. st. 1. c. 16. ordaining, that no protection with a clause of *profecturus* be allowed in any plea commenced before the date of the protection, if it was not in a voyage where the king went in person, or in some voyage royal, or on the king's messages for business of the realm; but such persons were to make their attornies to answer for them, or were to stay themselves. Notwithstanding this restraint on the above protections, the protection *quia moraturus* was to be allowed in all cases, as before. It was likewise provided, that if any person remained in the country, without going on

(*a*) Vid. ant. 115.

the service for which he was retained, the chancellor might repeal the protection. Thus far of the statutes which had any influence on the administration of civil justice.

The commotions which happened in this reign, and the vicissitudes experienced by the several contending parties, had an effect upon our criminal law. When that could be made an instrument in the hands of either to destroy their opponents, they never failed of availing themselves of it; and at every revolution they endeavoured to give a new edge to the sword of justice. In no period of our history was the crime of treason imputed so promiscu-
ously to all sorts of resistance and opposition. Of treasons.

This extravagance was not confined to the lords in parliament, who might be hurried into violent measures by the heat of contest and the flush of success; but we shall find the sages of the law giving deliberate opinions of the same import, upon questions stated in writing: so that the subject seemed to derive little benefit from the statute of treasons.

The first alteration made in the law of treason, was by act of parliament. It was enacted by stat. 5 Ric. II. st. 1. c. 6. that if any made or begun any manner of riot and *rumour, or the like*, and the same was duly proved, it should be done of him as of a traitor to the king and realm. A declaration of treason like this, might perhaps be excused by the late riots, which had been carried to a length sufficient to endanger the safety of the government. Two years before that statute, it happened that one *John Imperial*, an ambassador from the state of *Genoa*, was killed in London: this had been deemed treason by the judges, and that sentence was confirmed by parliament; the reason alleged being, that it affected the king's majesty (a).

(a) 3 Ric. II. Cott. Abri. p. 183. § 18.

In the 17th year of the king, we find the duke of *Lancaster*, steward of England, and the duke of *Gloucester*, constable of England, complained in parliament, that Sir *Thomas Talbot* with other adherents conspired the deaths of the said dukes. This was adjudged by the king and lords in parliament to be open and high treason (a). The parliament made the above declarations by virtue of that power which was acknowledged to reside in it, by the statute of treasons; and which it could not be denied to possess, as necessarily belonging to its legislative authority.

The famous opinions given by the judges had not that sanction, and therefore should have been founded on principles of known and established law. The following was the occasion on which these opinions were taken: The king being compelled to sign a commission and call a parliament, at the instance of a great part of his nobles, wished to get rid of the act he had done under such compulsion; and, thinking the law on his side, caused certain of his judges and others to be consulted on different questions, calculated to stigmatize and declare void the late proceedings. In the 11th year of this reign, in the presence of the king and some lords at Nottingham castle, were summoned *Tresilian*, the chief-justice of the king's bench, and *Belknap*, chief-justice of the common bench; *Holt*, *Fulthorpe*, and *Burghe*, judges of the common bench; and *Lokton*, one of the king's serjeants at law. To these persons were propounded among other questions, the following, which received the annexed answers. Being asked, How those ought to be punished who procured the above-mentioned statute, ordinance, and commission? they answered, By capital pain; as ought those likewise *who excited the king to consent* to the said statute. Those who *compelled* the king to consent, they said, should be punished

(a) Cott. Abri. p. 353. § 20.

as *traitors*; as should those also who interrupted the king in the exercise of those things that belonged to his royalty and prerogative. The following question, namely, Whether, if the king *limited* to the lords and commons certain articles to be debated, and they proceeded upon others, and would not go upon the king's articles till he had answered theirs, the king should be obeyed? they answered, That such as disobeyed this rule of the king, should be punished as *traitors*. If the king dissolved the parliament, and any proceeded therein afterwards, they said, he was to be considered as a traitor. They said, it would be treason to impeach in parliament any of the king's officers, or justices; and that the person who moved that the statute whereby Edward II. was indicted should be sent for, and he who, by force of such motion, brought it into the parliament, were guilty of *treason*.

The judges who concurred in these opinions, were afterwards prosecuted as offenders; but things taking another turn, in the 21st year of the king, these opinions were read in full parliament, and there received the sanction of the legislature; and at the same time they were pronounced by Sir *Thomas Skelton*, and *Hankford*, and *Brenchley*, the king's serjeants, to be *good and lawful*. But it is recorded in the same statute of 21 Ric. II. that *Thirning*, and *Clopton*, successively chief-justices of the common bench, and *Richehill*, a judge in that court, gave a more discreet opinion upon the act of these judges: they said, that the declaration of treason not declared belonged to the parliament; and *if the offender were a lord*, or peer of parliament, and those questions had been put to *him*, he would have given the like answers: which was intimating that they were not consonant to the law, as established and known, but were fit enough to be declared treason by parliament.

In the same stat. 21 Ric. II. c. 3. some points of trea-

son which had been settled by the statute of treasons, were re-enacted, together with some others that were not within that act. Thus, it was ordained, that every one who compassed or purposed the death of the king, or to depose him, or to render up his homage or liegeance; and he that raised people, and rode against the king to make war within the realm, and was judged and attainted thereof *in parliament*, should be considered as guilty of high-treason, and should forfeit his lands, as well those in fee-tail as those in fee-simple. The difference between this act and the statute of treason is, that this did not require an overt act to be proved; but then it was to be judged of only in parliament; and lands in fee-tail were forfeit thereby. It was made treason to procure, or counsel to repeal or annul, any judgments given against statutes made in the parliament 11th Ric. II. which the king now procured to be declared void (a); and it was also declared treason for any one to attempt to repeal the stat. 21 Ric. II. (b)

Besides the above provision about riots, other statutes were made for the suppression of those disorders, which had lately grown to a height that threatened the existence of government. In stat. 2 Ric. II. st. 1. c. 6. there is a lively picture drawn of the riots which then very commonly happened. People used to come in great bodies, sometimes under pretence of taking possession of lands to which persons pretended they had a right; they would pillage a whole neighbourhood, carry off women and children, and commit all such acts of violence as might be expected from an invading enemy. To maintain the peace against such extraordinary attacks required more than the ordinary means. Among other methods it was ordained, that the statute of Northampton should be kept in all points; and moreover, that certain sufficient and *valiant persons*, lords, or others, should be assigned by the king's commission,

(a) Ch. 4.

(b) Ch. 20.

with authority to take such rioters, without waiting for an indictment, and commit them to custody till the coming of the justices. But this new authority was repealed by stat. 2 Ric. II. st. 2. c. 2. the statute of Northampton being thought quite adequate to the purpose. This repeal was procured by some great lords, who were too much interested in the outrages committed by these people (many of whom were their retainers and partisans) (a) to suffer any greater restraint to be put on their meetings. When the *villains*, about a year or two after this, had risen in different parts of the country, and compelled manumissions and privileges to be granted them, it was enacted, as we have seen, by stat. 5 Ric. II. st. 1. c. 6. that rioters should be punished as traitors. The discontents of the villains continued all through this reign. Upon the occasion of new disturbances made by this order of people, particularly in *Cheshire* and *Lancashire*, it was enacted by stat. 17 Ric. II. c. 8. that sheriffs, and other the king's ministers, should take such offenders; and that all lords, and others of the realm, should be assisting therein. We shall see what course was pursued in the next reigns, for the suppression and punishment of such disorderly persons.

The two statutes against *the spreaders of false* *Scandalum* *rumours* are said to have been procured by the *magnatum*. duke of Lancaster, who was extremely unpopular, and, at the time of the insurrections among the villains, had been singled out as a principal object of their fury. The first of these is stat. 2 Ric. II. st. 1. c. 5. The design of this act will be best understood from the preamble. “Of the
“devisors” (says the act) “of false news, and of horrible and
“false lies of prelates, dukes, earls, barons, and other
“nobles and great men of the realm; and also of the chan-

(a) Vid. ant. 158.

“ cellor, treasurer, clerk of the privy seal, steward of the
“ king’s house, justices of the one bench or of the other,
“ and of other great officers of the realm, of things which
“ by the said persons were never spoken, done, or thought;
“ in great slander of them, and whereby debates and dis-
“ cords might arise betwixt them, or between them and
“ the commons, and great mischief to the realm :” these
were the objects meant to be aimed at by this statute ; and
it was enacted, that none, under grievous pain, be so hardy
as to devise, speak, or tell any false news, lies, or other
such false things, of the abovementioned persons, whereof
discord or slander might arise within the realm ; and those
who offended therein were to be liable to the statute of
Westm. 1st (*a*), which directs such offender to be taken
and imprisoned till he had found the person by whom the
speech was moved : but this not being likely to produce
the effect intended, it was enacted by stat. 12 Ric. II. c. 11.
that, should he not be able to find such person, he should be
punished by the advice of the council, notwithstanding the
said statutes.

We have hitherto met with nothing on the subject of
public nuisances: we find now a statute (*b*), ordaining pro-
clamation to be made for removal of public nuisances;
such as offal thrown in the streets and ditches near towns;
with a penalty of forty shillings on offenders ; who were to
be called before the chancellor by writ, if they refused to
remove the annoyance. By another act, the laws against
maintenance were directed to be enforced (*c*).

Notwithstanding the act passed in the last reign (*d*) to
prevent the frequent granting of pardons, great clamour
was still made on this subject. We find the commons
had petitioned that the king might grant no more par-
dons. To this the king refused to consent, but agreed to

(*a*) Vid. ant. vol. II. 129. (*b*) Stat. 12 Ric. II. c. 13. (*c*) Stat. 1
Ric. II. c. 4. (*d*) Vid. ant. vol. II. 464.

the following act (*a*), ordaining that no charter should be allowed before any justice for murder, or for the death of a man slain by await, assault, or malice prepense, for treason, or rape of a woman, *unless* the fact was specified in the charter. Where the pardon of the death of a man was exhibited without specifying the fact, the justices were to enquire, by an inquest of the vicinage where the fact was committed, whether the murder was by await, assault, or malice prepense; and if it was found to be either, the pardon was to be disallowed. If any one sued for a pardon for the death of a man slain in either of the above ways, the chamberlain was to indorse on the bill the name of the person suing, upon pain of a thousand marks, and the under-chamberlain upon pain of five hundred. These bills were always to be directed to the keeper of the privy seal; nor was any warrant of the privy seal to be made out without a bill so signed and indorsed. No charter of pardon of treason, or felony, was to pass the chancery without a warrant of the privy seal, but where the chancellor might (*b*) grant it *ex officio*, without speaking to the king; and great penalties were to be paid by those who sued pardons in any of the above crimes; that is, an archbishop or duke was to forfeit a thousand pounds, and so in proportion of lesser dignities; a clerk, bachelor, or other of less estate, two hundred marks. But the whole of this statute, except that relating to a specification of the fact, and an inquiry of the truth of it by an inquest, was repealed by stat. 16 Ric. II. c. 6.

The stat. 2 Ric. II. c. 4. may be ranked among the penal laws of this reign. This ordained, that mariners, who had been *arrested* and retained for the king's service, and then fled, should, besides forfeiting double what they had taken for wages, suffer a year's imprisonment: this

(*a*) Stat. 13 Ric. II. st. 2. c. 1. (*b*) Vid. anti. vol. II. 153. (*a*)

offence was to be enquired of before the admiral, or his lieutenant (*a*). It appears by this act, that mariners used then to be *compelled* into the service in a way which the legislature did not scruple to call an *arrest*; signifying as compulsory a method as the law made use of on any occasion. The carrying of gold or silver out of the kingdom was forbidden by stat. 5 Ric. II. st. 1. c. 2. under the penalty of forfeiting all that the offenders could forfeit: prelates were not to export their payments, even by exchange, without licence. All persons were by the same act restrained from going beyond sea, without the king's licence, and then it was to be only at certain ports: those who offended therein were to forfeit all their goods, and the persons carrying them to forfeit their vessel. This law continued in force till the time of James I. (*b*)

Some grievances in the manner of executing the forest laws were removed by stat. 7 Ric. II. c. 3 & 4. (*c*) It was provided, that no jury should be compelled by any officer of the forest, or other, to travel from place to place, out of the place where their charge was given, unless they so pleased; *nor were they*, says the act, *to be constrained to give a verdict otherwise than according to their conscience*. Again, no one was to be taken or imprisoned by any officer of the forest without indictment, or being taken with the manner, or trespassing in the forest; nor was any one to be compelled to make an obligation or ransom to an officer of the forest: and any one offending against this act was to pay the party damnified double damages, and be fined to the king.

While these restrictions were imposed on the old forest law, a sort of new forest-law began to shew itself; which, since the enlargement it has received in later times, is endured with as little acquiescence as the old; being calculated, like that, to promote the pleasures of

(*a*) Vid. ant. 197. (*b*) Stat. 4 Ja. I. c. 1. § 22. (*c*) Vid. ant. vol. II. 106.

the great by restricting those of the lower orders of society. This new system is, perhaps, attended with particular circumstances of aggravation; for whereas the old law was for the protection of the king's diversions, and was local, this is in favour of all lords and great landholders, and extends to every spot Game Laws. of ground in the kingdom: so that, coming more nearly home to the observation of men, it is more generally felt, though indeed less severely, than the forest-law.

The design of the legislature in the first act on this subject will appear from the preamble, which informs us, that “divers artificers, labourers, servants, and grooms, “keep greyhounds and other dogs, and on the holidays, “when good christian people be at church hearing divine service, they go hunting in parks, warrens, and “connigries of lords and others, to the very great destruction of the same; and sometimes under such colour “they make their assemblies, conferences, and conspiracies to rise, and disobey their allegiance.” Thus was the safety of the state, as on other occasions, made a reason for imposing the following restrictions; for it was ordained by stat. 13 Ric. II. st. 1. c. 13. that no artificer, labourer, nor any other layman, not having lands or tenements of forty shillings per ann. nor priest, or other clerk (if not advanced to the value of ten pounds per ann.) should keep any greyhound, hound, or other dog to hunt; nor use ferrets, keys, nets, hare-pipes, nor cords, or other engine, to take or destroy deer, hares, conies, or other *gentlemen's* (a) game, on pain of a year's imprisonment; to be enquired of by the justices of the peace. This was the first stone in the present fabric of *game laws*; and seems merely a regulation of police, to confine the lower class of people from mis-spending their time in a way that was neither useful to themselves nor the community.

(a) *Des gentils.*

Justices of the
peace.

The authority of justices of the peace was considerably enlarged in this reign, and several regulations were made for the due holding of their sessions, the proper choice of persons to fill this office, and other matters concerning their jurisdiction. By stat. 7 Ric. II. c. 5. they had power to enquire of vagabonds, and to compel them to find sureties for their good behaviour, otherwise to commit them to prison till the coming of the justices of gaol-delivery. The next statute respecting justices of the peace is stat. 12 Ric. II. c. 10. which enacts, that in every commission of the peace there should be assigned but six justices, besides the justices of assises (who were always put into the commission); and these six justices were to hold their sessions every quarter of a year at least, and by three days, if need were, on pain of being punished at the discretion of the king and council, at the suit of any one who would complain. They were to enquire, if mayors, bailiffs, and others, properly executed what was required of them in the ordering of beggars and vagabonds, servants and labourers; and were to punish defaults. The justices were each to have four shillings a-day during the sessions, and two shillings for their clerk; this to be paid by the sheriff out of the fines and amercements arising at the sessions. By stat. 13 Ric. II. st. 1. c. 7. it was ordained, that justices should consist of the most sufficient knights, esquires, and gentlemen of the law, of the county, without any exemption for the stewards of lords, as was granted by the former act; and they were to be sworn to put in execution all the statutes relating to their office. By stat. 14 Ric. II. c. 11. there were to be eight justices in every county. As some lords had been put into the commission at that parliament, it was ordained that no duke, earl, baron, or banneret, should take any wages: and the wages were to be paid by indenture between the justices and the sheriff. The next statute relating to these justices was stat. 15 Ric. II. c. 2. before mentioned, which gives them authority to

proceed in a summary way in cases of forcible entry. By stat. 17 Ric. II. c. 9. they were made conservators of some old statutes for preservation of salmon, and the fry of fish. The last act on this head is chap. 10. of the same statute, which ordains, that in every commission of the peace there should be, if need was, two men of the law of that county, who should make deliverance of thieves and felons as often as they might think it convenient.

Such is the progress that was made by parliament in altering our law during this reign. The decisions of courts, for the reasons before given (*a*), we shall pass over in silence.

The law is not much indebted to this king. The king and It is said to have been the inclination of Richard government, and some of his favourites to countenance the incroachments of the civil law; though this, probably, went no further than a partiality for such parts of it as favoured high sovereign authority.

In the reign of this prince, when the sovereign authority often changed hands, when the nation was governed at one time by the king, at another by an authority delegated to certain lords, who, in the struggle for power, pursued each other with the most unrelenting animosities, it is not to be wondered that the law was occasionally made subservient to the successful party, and taught to speak that language which would confirm their interests, and destroy all those who opposed them. Most of the extravagancies which arose from this state of things, consisted in judgments of treason, and attainders of obnoxious persons, without due examination or trial.

It was in this spirit, that conspiring the death of the dukes of Lancaster and Gloucester, the king's uncles, was, as before mentioned, declared by the king and lords to be high treason (*b*); that Sir Thomas Haxey was condemned to

(*a*) Vid. ant. 156.

(*b*) Cotton's Abrid. 354.

die the death of a traitor, for having moved in the house of commons, that economy might be promoted at court, and that to attain such end, the court should not be so much frequented by *bishops* and *ladies* (a). Of the like kind was the prosecution before the committee of parliament, against *Henry Bowet*, attorney to the duke of Hereford, who having solicited for the duke concerning the possession of his father's estate, was adjudged a traitor; but in this case the punishment of death was changed to banishment (b). These and the like abuses of law and justice must be ascribed to the violence of the times.

There is no year-book of the reign of Richard II. in print; but Sir Matthew Hale says, he had seen the entire years and terms of this king in manuscript (c). There are some cases of this reign to be found in *Jenkins's Centuries*, some in *Keilway*, some in *Benloe*, and some in *Fitzherbert's Abridgment*. All these scattered notes have been collected by *Bellewe*, and digested under heads; making a sort of substitute for a year-book of this king.

(a) Cotton's Abrid. 362. (b) Tyrr. vol. III. 991. (c) Hist. Com. Law, 175.

CHAP. XVIII.

H E N R Y IV.

Election of Members—Of the Clergy—Vicars instituted and inducted—Statutes of Labourers—The Parliament and Council—Attornies—Repeal of Treasons—Heretics—Multiplication—Pardons of Provors—Insidiatores Viarum, &c.—Riots—Actions upon the Case—Of Assumpsit—The criminal Law—Peine forte et dure—The King and Government—The Statutes—Reports.

THE judicial history of Henry IV. has an advantage over that of his predecessor; for the decisions of courts as well as the provisions made by parliament during this reign have come down to our times. Our attention, however, will be principally engaged by the latter. The laws of this king are upon many of the subjects which were canvassed by parliament in the former reign. One article of regulation was wholly new, and distinguishes this king's reign as the period when the first provisions were made for securing to the people a due and faithful choice and return of their representatives.

In the fifth year of the present king a special act was passed for the punishment of a person who had assaulted, beat, and wounded a menial servant to one of the knights representing the county of Somerset, during the time of parliament. It was enacted (a), that proclamation should be made where the fact was done, commanding the offender to

(a) Ch. 6.

appear in the king's bench within a quarter of a year; if not, to be attainted of the fact, and pay the injured party double damages, to be taxed by the judges, or, if need were, by an inquest; and further pay a fine to the king; *and so* (says the act) *shall it be in all similar cases*. It was in the same parliament prayed, that all persons who arrested a knight, or burgess, or any of their servants, knowing them to be such, should be fined at the king's pleasure, and render treble damages to the party grieved. To this it was answered, that there was a sufficient remedy already (*a*). What this remedy was does not appear, unless it is to be collected, that the privilege was so notorious and established, as to intitle the party injured to an action.

Election of
members.

It was complained in parliament, that the election of knights of counties was sometimes made according to the pleasure of the sheriffs, and generally against the form of the writ directed to the sheriff. To prevent this in future, it was enacted by stat. 7 Hen. IV. c. 15. that the election of knights should be in the following way; namely, at the next county to be held after the delivery of the parliament-writ, proclamation was to be made in the full county of the day and place of the parliament; and that all those then present, as well suitors duly summoned for that cause, as others, should enter upon the election of knights; and then, in full county, they were to proceed freely and indifferently, notwithstanding any request or command to the contrary. After they were chosen, their names were to be written in an indenture, under the seals of all those who chose them, and tacked to the same writ of parliament; which indenture, so sealed and tacked, was to be held for the sheriff's return of the said writ, as far as concerned the knights of the shire. It was also enacted, that in the writs of the parliament, in future, this clause should be

(*a*) Cott. Abri. p. 433. § 74.

put; *et electionem tuam in pleno comitatu tuo factam distinctè et apertè sub sigillo tuo, et sigillis eorum qui electioni illi interfuerint, nobis in cancellariâ nostrâ ad diem et locum in brevi contentos certifies indilatè.* But because no penalty was inflicted by this statute on sheriffs who did not conform thereto, it was ordained by stat. 11 Hen. IV. c. 2. that the justices of assise should enquire of such returns in their sessions; and if it was found by inquest, and due examination before them, that a sheriff had made a return contrary to this act, he was to be fined one hundred pounds; and knights so unduly returned were to lose their wages. Before these two acts there was no statute relating to this matter, unless the statutes of Edward I. (a) for free elections could be considered as such.

The two grand objects of reformation in church matters, the restraining the interference ^{Of the clergy.} of papal authority, and providing for the regular maintenance of vicars, were pursued in this reign. The weapon now used against the pope and his adherents was the statute of provisors, 13 Ric. II. st. 2. c. 3. which had put the proceeding by *præmunire facias* into a stricter course (b). Many new cases were now brought within the penalty of this law. It was enacted by stat. 2 Hen. IV. c. 3. that if provision was made by the bishop of Rome to any person, religious or secular, to be exempt from obedience regular, or to have any office perpetual within houses of religion, or as much as one regular person of religion, or two, or more, had in the same, and such provisors accepted the same, they should incur the pains of stat. 13 Ric. II. st. 2. c. 3. Again, because complaint was made that the *Cisterrians* had purchased bulls to be discharged of tithes, and that this exemption used to be extended to their tenants, it was enacted (c), that they should continue in the condition they were in before the

(a) Vid. ant. vol. II. 109.

(b) Vid. ant. 164.

(c) Ch. 4.

purchase of such bulls; and they and all other orders which purchased bulls, or by colour of any bulls pretended to avail themselves of a discharge from tithes, were to be warned to appear in two months by writ of *præmunire facias*; and if they made default, or were attainted, they were to incur the penalties of the before-mentioned act of Richard II.

Vicars instituted and inducted.

Such were the securities provided for the due payment of tithes, when an act was passed in aid of the statute of Richard II. (a) concerning vicars. It was by stat. 4 Hen. IV. c. 12. enacted, that the former statute should be duly observed; that licences of appropriation made since should be reformed according to the effect of that act; and if such reformation was not made within a certain time, the appropriation and licence were to be void. All appropriations of vicarages since the first year of Richard II. were declared void. And further it was enacted, that in every church so appropriated, or to be appropriated, a secular person should be ordained vicar *perpetual*, canonically *instituted and inducted*, and *convenably endowed* by the discretion of the ordinary, to do divine service, to inform the people, and to keep hospitality; and no religious person was to be made vicar in any church so appropriated. Thus was it at length ordained, that vicars should have institution and induction, which gave them the same tenure as parsons; and to avoid the abuses which had been so long complained of, religious houses were no longer suffered to appoint any of their own body to such appropriated vicarages as belonged to them.

The religious orders were no longer in such consideration as they had been. A statute was made in this parliament restraining the four orders of friars, that is, the *friars minors*, *Augustines*, *Preachers*, and *Carmelites*, from

(a) Vid. ant. 168.

taking any person into their order, under fourteen years of age, without the assent of the parents of the child; and the chancellor was authorized, upon complaint duly made before him, to enquire into breaches of this statute, and to punish the heads of the society according to his discretion (a).

Further provision was made for the regular payment of tithes. It was enacted by stat. 5 Hen. IV. c. 10. that farmers and occupiers of the possessions of aliens should be bound to pay all tithes due to parsons and vicars, notwithstanding they were seised into the king's hands, or any prohibition to the contrary. Again, it was ordained by stat. 7 Hen. IV. c. 6. that no person should be discharged of tithes by colour of any bulls; and if any were molested by pretence of such bulls, the offenders were to be liable to the penalty inflicted on the *Cisterians* by stat. 2 Henry IV. c. 4. Because it had sometimes happened, that provisions from the pope had been licensed by the king, it was enacted (b), that no licence or pardon so granted should be available, if the benefice was full of an incumbent at the time it was granted. These *licences* shewed that the statutes against provisions were not executed with rigour. However, in the ninth year of this king, a statute (c) was made, confirming all the statutes against provisions and translations of bishops, and (d) declaring, that the election to spiritual preferments should be free. The other laws relating to church matters were such as were made against heresies; but these, unhappily for the first promoters of reformation in our church, were of a sort which obliges us to rank them amongst those that make a part of our penal law.

Nothing remarkable was ordained respecting the lower class of people, except a regulation about apprentices made by stat. 7 Hen. IV. c. 17. It was

Statutes of
labourers.

(a) Stat. 4 Hen. IV. c. 17.

(b) Ch. 8.

(c) Ch. 8.

(d) Ch. 9.

complained, that, notwithstanding the statute of Canterbury (*a*), ordaining that no person who had worked in husbandry till twelve years of age should be permitted to be put to any mystery or handicraft, yet the children of many persons having no land or rent, were bound apprentice to crafts in cities and boroughs, "*for the pride of clothing, and other evil customs that servants do use in the same;*" which produced a scarcity of labourers and servants. To prevent this, it was enacted by the above act, that no one should put his son or daughter apprentice to any craft or labour within a city or borough, except he had land or rent to the value of twenty shillings per ann. at least; but he should put them to other labour as his estate required, on pain of one year's imprisonment. Any person willing to make his child apprentice, was to bring to the mayor or bailiff of the place a bill sealed by two justices of the peace, testifying the value of the parent's lands. Any person taking an apprentice contrary to this act, was to forfeit a hundred shillings, to be recovered by complaint to the justices of the peace. All labourers and artificers were annually to be sworn at the leet, to observe the statutes relating to their wages and service; and if they refused, they were to be put in the stocks for three days. To facilitate this, it was provided, that every town or seignory not having stocks should be fined a hundred shillings.

The laws passed in this reign respecting the rights of property were few; being only those which concerned the king's grants. It should seem that Henry, as well as Richard, had been too easy in making grants to his favourites: to prevent this in future, it was endeavoured to avoid the misrepresentations and deceits which used to be imposed on the king to obtain such grants. Thus it was provided, by stat. 1 Hen. IV. c. 6. that all those who demanded lands,

(*a*) Vid. ant. 170.

tenements, rents, offices, annuities, or any other profits, should make express mention in their petitions of the value of the thing, and also of such things as they before had of the gift of the crown; and in failure of this, the grant was to be void. Again, it was ordained (a), that where lands were granted to the king without title found by inquest, or the king being otherwise intitled to enter, those who were disseised by the king's patentees should have a *special assise*, without the chancellor speaking to the king; and if they recovered, should have treble damages. The statute requiring the value of the thing petitioned for, to be specially mentioned, was explained by stat. 2 Hen. IV. c. 2. which, among other matters, excepts all confirmations and licences to be made by the king: these were not to be void, though the petition did not mention the value. Stat. 4 Hen. IV. c. 4. went still further than the first; for, after declaring that the king would make grants to none but those who deserved it, and as it should seem best to himself and his council, it ordained, that all those who made any demand contrary thereto should be punished by the advice of the king and council, and never have their demand. After this, a further explanation was made of stat. 1 Henry IV. by excepting the queen and the king's son (b).

An attempt was made by the commons to effect an alteration in the judicature of parliament. The commons, who had been called to parliament in the reign of Edward I, merely to consent to taxes upon themselves and their constituents, when they had discharged that office, were not any further considered, nor looked upon as a necessary part of the *legislature*. The attention which had been occasionally shewn to their petitions for redress of grievances, by making statutes in pursuance of them, was a matter of grace in the king and lords; and was usually conferred either to reward them for, or to purchase, a

(a) Ch. 11.

(b) Stat. 6 Hen. IV. c. 2.

supply of money. In proportion as the king stood in need of this resource, those who held the purse of the nation grew into importance.

The parliament and council. The annual sitting of parliament during the long reign of Edward III. had familiarized the commons so much to the condition of parliament-men, that they began to consider themselves as part of the *legislature*; and their claim was so far favoured, that their assent is mentioned not only to the taxing of their constituents, but sometimes to general laws for the government of the kingdom. Notwithstanding this, matters purely of a judicial nature were still considered as within the exclusive province of the king and lords (a). It was a part of their original constitution to be the supreme court of the nation; and (it was thought) the admission of the commons to assent to general laws could make no precedent that would intitle them to interfere with the judicature of parliament.

But the consequence of allowing the commons to assent to laws in the time of Edward III. was, that during the reign of Richard II. this was settled by long usage into a matter of right; and in the reign of Henry IV. they advanced their pretensions so far, as to claim a participation in that judicial capacity which the lords had deemed to be solely their own. In this attempt they might reason upon very just ground. The awards, they might say, made by the king and lords in matters of private property were agreed to be the highest judgments that could be given; they are upon subjects which are not within the cognisance of inferior courts; and the relief afforded is of a kind which dispenses with and over-rules the general course of the law: but the law cannot be dispensed with, nor altered otherwise than by an act of the legislature; therefore the assent of the commons, as a part of the legislature, is necessary in all these judgments on private petitions. In this manner

(a) Vid. ant. vol. II. 406.

might the commons have argued ; and probably such reasoning as this encouraged them in the following instance to advance their claim to this supposed right.

In the reign of Henry IV. there was a petition to the king in parliament on behalf of the restored archbishop, praying, that he might have recovery for sundry wastes and spoils against *Roger Walden*, who had been appointed to the see during his exile. The king instantly granted it, and it became an award in the usual way. But the commons hearing of this, prayed the king, that since *they* were not made privy to the judgment, no record might be made to charge or make them parties therein ; a language which was artfully enough contrived to conceal any consciousness that their interference might be thought new or ill-founded. But the king was more explicit in his answer: the archbishop, by his command, told them, *that the commons in parliament were only petitioners; and that all judgments belonged to the king and lords, unless in statutes and the like; which ordinance the king willed should be from that time observed (a).* The commons acquiesced in this command of the king, and no further attempt was made in this and the two next reigns to participate in the judicature of the king and lords.

The jurisdiction of the parliament and council was still viewed with a jealous eye (b). It was complained, that after judgment given in the king's courts, the parties were made to come, *upon grievous pain*, sometimes before the king himself, sometimes before the king's council, and sometimes to the parliament, to answer there anew ; which was considered as subversive of the common law, as well as a great grievance to the people. To prevent this in some degree, it was enacted, by stat. 4 Hen. IV. c. 23. that after judgment given in the king's courts, the parties and their heirs should continue in peace, until the judgment

(a) Parl. Hist. vol. II. 50.

(b) Vid. ant. vol. II. 417.

was undone by attaint or error, according to the old laws.

Though the preamble of this statute is only aimed at *subpœnas* summoning persons before the king himself, the council, and the parliament; yet the enacting clause is so general, that it might be, and afterwards was, construed as applicable to the equity-jurisdiction in chancery. It was an easy construction to say, that all equitable considerations arising on such judgments should be silenced; and that no court, upon any ground whatsoever, should presume to discuss their propriety, or suspend their effect.

The commons had two years before gone further than the provisions of this act respecting the two new courts of equity; for they prayed that no *subpœna* might issue out of the chancery or *exchequer* (a). It was also prayed in the same parliament, that there might issue out of the *exchequer* no more writs of *datum est nobis intelligi*. But to this it was answered, that the old usage should continue (b).

It seems, that while the chancellor was trying all means to establish his judicature, there begun silently to obtain in the court of exchequer a practice to entertain suits in the like manner by *subpœna*, and suggestions by bill; which proceedings are here complained of, as equally new and illegal with those in chancery. It was not at all unnatural, that an equitable jurisdiction should be exercised by the court of exchequer; for the cognisance of the king's debts being confined to that court, it would have been hard indeed, that suitors there should be deprived of those equitable remedies which all common suitors might have in chancery; and as this court had a chancellor of its own, there seemed nothing wanting to complete the form and circumstance of a court of equity. Thus, as common persons sued in chancery, it became the custom for the king's debtors to file their bill in the exchequer. So ill

(a) Cott. Abri. p. 410. § 99.

(b) Ibid. p. 413. § 99.

founded is the opinion, that the court of equity in the exchequer was not heard of till the time of Henry VIII. and that it was founded on stat. 33 Hen. VIII. c. 39 (a). At length the connexion between a chancellor and a court of equity became so inseparable, that it will be hardly too general to pronounce, wherever that officer was, there was also that jurisdiction.

At another time, we find it was prayed by the commons, that the statutes about *suggestions* made in the reigns of Edward III. and Richard II. should be observed (b). With all this solicitude to keep the jurisdiction of the council within bounds, there is more frequent mention of it, and more instances of its judicial powers, than in any former period (c). Many applications were made to parliament concerning the bounds of jurisdiction in the constable and marshal, and the steward and marshal (d); but no statute was enacted on either of those points.

The jurisdiction of the court of admiralty still continued to excite jealousies; and many applications were made to parliament on the subject: these produced a statute in the second year of the king, by which it was enacted, that the statute of Richard II. should be observed; and moreover, that whosoever felt himself grieved contrary thereto, should have his action by writ grounded upon the case against him who so sued in the admiral's court, and recover double damages. The party was also to forfeit ten pounds to the king.

Next, as to the course of proceeding, and other matters relating to the ordinary administration of justice. The grievous injury done by those who made forcible entries, and otherwise got violent possession of land, occasioned some statutes that rendered the proceeding by assise rather more expeditious: this was by granting of course a *special assise*, to enquire of the fact immediately, without waiting for the general commission, which issued only twice a-year. The

(a) 4 Inst. 118. (b) Cott. Abri. p. 422. § 78. (c) Cott. Abri. Hen. IV. passim. (d) Cott. Abri. p. 411. § 79. p. 432. § 64.

first instance in which the parliament resorted to this method, was, where persons had obtained grants of the king, and by virtue of such patents had turned out the true owners. It was enacted by stat. 1 Hen. IV. c. 8. that where lands were granted by the king's patent, without title found by inquest or otherwise, and the king had no entry by law, the person so disseised should have a *special assise* of the chancellor's grant, *without any suit to the king*; and if he recovered, he was to have treble damages. The next instance in which special assises were to be granted without suit to the king, was, where (a) any one made forcible entry to the use of himself or of another, by way of maintenance, or took and carried away any goods from the possessor of the freehold after such forcible entry; in such cases the party attainted was to suffer a year's imprisonment, and yield double damages. In such special assises was to be named a justice of one of the benches, or the chief baron, if he was a man of the law.

We have seen (b), that by the statute of Richard II. a disseisee was enabled to bring his assise against the disseisor if he took the profits, and the assise was brought within a year; this limitation was now thought too short; and therefore, by stat. 4. Hen. IV. c. 7. the disseisee is allowed to bring his assise against the first disseisor at any time during the disseisor's life, if he took the profits. As to other real writs, the demandant was to commence his suit within a year against the person who was tenant of the freehold at the time the action accrued to him, if such tenant *took the profits* at the time the suit was commenced. This provision was followed by several others of the same nature in subsequent reigns, and they were usually called *statutes of perners of profits*.

Because in assises of novel disseisin, and other real writs, it had been common, where lands lay in ancient de-

(a) Stat. 4 Hen. IV. c. 8.

(b) Vid. ant. 202.

mesne and within franchises, to charge the bailiff, lord, mayor, or other chief officer, as a wrong-doer, in order to deprive him of the benefit of his franchise in that instance, it was enacted by stat. 9 Hen. IV. c. 5. that in such cases the justices of assise should (if the persons required it) first enquire by the assise in the country whether they were really disseisors or tenants; and if it was found that they were named by collusion and fraud, the writ was to be abated, and the plaintiffs to be in grievous mercy. The other statute relating to real writs is stat. 4 Hen. IV. c. 22. concerning the remedy incumbents were to have, if ejected by the king's presentee; these persons were hereby permitted to sue at any time, without being confined to the term of a year, as they had been by some late acts (*a*).

Some few regulations were made respecting personal actions, and actions in general. It was enacted by stat. 2 Hen. IV. c. 7. where a matter was adjourned on account of some difficulty, after a verdict, that if the verdict had passed against the plaintiff, he should not be nonsuited; meaning, that he should be barred by the verdict. This expedient of plaintiffs resorting to a nonsuit, was used on other occasions. The commons prayed, that when the defendant had waged his law, the plaintiff might not be nonsuited; but no statute was made to prevent it (*b*). It had lately become the practice, that a defendant should not be admitted to wage his law against an account settled before auditors, though this was contrary to the usage in the time of Edward the Third (*c*). It was complained, that this new point of law had been much abused; for plaintiffs would, in an action of debt upon arrears of account, surmise that the defendant had accounted before auditors; which auditors might, perhaps, be only apprentices or servants to the plaintiff; and in truth no account had been

(*a*) Vid. ant. vol. II. 378. (*b*) Cott. Abri. p. 466. § 33. (*c*) Vid. ant. 97.

taken, nor was any thing really due; but the plaintiff would get a favourable inquest, and so obtain a recovery. To prevent this, it was enacted, that the justices in the king's courts, and other judges before whom such actions in cities and towns were brought, should have power to examine the attornies and others, and thereupon receive the defendant to his law, or try the point by inquest, according to their discretion.

Some statufes were made for the government of process. It was enacted by stat. 5 Hen. IV. c. 12. that when a statute-merchant was certified into chancery, and a writ awarded, and returned into the common-pleas, and the statute there *once* shewn, the justices might re-continue the process till full execution was had, without a second view of the statute. Because many people were outlawed by erroneous process, and by reason of sickness could not appear in person, as the law required, to reverse such outlawries, it was enacted by stat. 7 Hen. IV. c. 13. that the justices and chief-baron should examine such persons, and thereupon admit their attornies: however, the writ of *capias ad satisfaciendum* was to continue as at common law. That the execution of process might not be defeated by those who had the custody of persons imprisoned, it was enacted by stat. 7 Hen. IV. c. 4. that, in an action against a gaoler for an escape, no protection should avail.

For the safe keeping of records, and also to preserve them intire and unaltered, it was ordained by stat. 11 Hen. IV. c. 3. (as had been before provided)(a) that the justices of assise should cause to be delivered into the king's treasury all records of assises of novel disseisin, of mortaucestor, and of certifications (with all appurtenances and appendages), before them determined. And further it was provided, that the records and process of pleas, real and per-

(a) Vid. ant. vol. II. 423.

sonal, and of assises of novel disseisin and mortauncestor, certifications and others, whereof judgment was given and enrolled, or things touching such pleas, should in no wise be amended or impaired by new entering of the clerks, or by the record or thing certified, in witness, or commandment of any justice, in any term after judgment given and enrolled.

The extortion of sheriffs, and the fermes of their bailiwicks, occasioned some few regulations of the same sort with those that have been frequently before mentioned (*a*). At length it was enacted by stat. 4 Hen. IV. c. 5. that sheriffs should abide in their bailiwick during their office, and should not let it to ferm to any one: and these two points were to be inserted in the sheriff's oath.

The parliament began to make some provision Attornies. for ordering *attornies*, who had now become a very considerable body of men (*b*). Complaint had been made of the mischiefs arising from their ignorance and want of knowledge in the law; and therefore, to make sure of their qualifications, it was ordained by stat. 4 Hen. IV. c. 18. that all attornies should be examined by the justices, and by their discretions their names should be put in a roll: they were to be *good and virtuous*, and *of good fame*; and if they appeared to be such, they were to be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign county: all other attornies were to be put out, and such as were passed in the above manner were to be put in their places by their *masters*, that is, by their clients. It was enacted, that when qualified attornies died, or ceased to act, the justices might appoint others in their room, being virtuous and learned, and sworn as above mentioned. It was enacted, that if any attorney was found notoriously in default, of record, or otherwise, he should forswear the court, and never be re-

(*a*) Vid. ant. vol. II. 402. and vid. stat. 1 Hen. IV. c. 11. (*b*) Vid. ant. vol. II. 304, 305.

ceived to make suit in any of the king's courts: this ordinance was also to be observed in the exchequer, at the discretion of the treasurer and barons. It was again ordained, by chap. 19. of the same act, that no steward, bailiff, nor minister of lords of franchises, having return of writs, should be attorney in a plea within the franchise.

It seems as if some act was made on this subject in the 11th year of this king, though it does not now appear; for in the 13th year the clerks and attornies of both the benches prayed a revocation of it. The answer of the parliament to that petition was, that the justices of both the benches should consult about it, and also concerning other mischiefs in the said courts (*a*). In this reign some acts were made for settling the fees of courts; as those of the marshal, of the chirographer, the clerk of the crown, and the like (*b*). Some regulations were also made to prevent the embezzling of writs on which fines were levied, and substituting other fees, and notes of fines, in the place of the true ones (*c*).

We now come to the consideration of such statutes as relate to the criminal law. The vindication of Henry and his adherents required that the articles of treason enacted in the 21st year of the last reign, should not be suffered to continue in force. In the 1st year of Hen. IV. it was enacted, that whereas in the 21st year of Richard II. divers pains of treason were enacted by statute, *insomuch that no one knew how he ought to behave himself, to do, speak, or say, for doubt of such pains*; therefore, in no time to come any treason should be adjudged otherwise than as was ordained by statute in the preceding reign; meaning the statute of Repeal of treasons 25 Ed. III. This measure of repealing treasons. new enacted treasons, by declaring all void but those contained in the statute of Edward III. was resorted

(*a*) Cott. Abri. p. 483. § 49. (*b*) Stat. 2 Hen. IV. c. 8. 10. 23. (*c*) Stat. 5 Hen. IV. c. 14.

to in later times, when the law had been occasionally overstrained to answer particular purposes.

The same motives of favour to his partisans which induced Henry to concur in the above act, led him to consent to some laws of an opposite nature; for in the next year after this humane statute was passed, the king, at the instigation of the clergy, by whom he had been materially served at the time of his claiming the crown, consented that some rigorous measure should be devised against the *heretics*, or *Lollards*, as they were then called. The punishment of *heretics* by burning is mentioned in Bracton; and this was in England, as in all other christian countries, the pain which religious zealots had agreed in inflicting upon all those who oppugned the established superstitions. Notwithstanding this, it has been a doubt whether the writ *de hæretico comburendo* was a common-law process, or was given by this statute; though it should seem, from the scope and wording of this act, that nothing more was meant, than that the bishop should be enabled to direct execution without the intervention of this writ; for it enacts, that *credence should be given to the diocesan* by the sheriff, who was to receive the offender, and cause him to be burnt. So far, therefore, from appointing or even confirming this writ, the present act seems in some degree to supersede it.

At present there was no temporal law in force against heresy; for the statute of Richard II. Heretics. which was the first made on that subject, and had been obtained surreptitiously, was repealed the next year, as has been before shewn (a). The stat, 2 Hen. IV. c. 15. was now made, containing, like other acts upon clerical matters, a minuteness and length not usual in the other statutes of this period. The meetings of heretics in their conventicles and schools are stigmatized in this act with the name of confe-

(a) Vid. ant. vol. II. 163.

deracies to stir up sedition and insurrection; the very pretence that had been made use of by the Romans against the primitive Christians, and which had been adopted by the Romish church ever since, to suppress all opposition or inquiry into its errors. To prevent persons of this description from escaping out of the bishop's diocese, it was now ordained, that none should presume to preach openly or privily without the licence of the diocesan of the place first had and obtained, except curates in their churches. None were to hold, teach, or instruct, openly or privily, or write any book contrary to the Catholic faith or determination of holy church, nor make conventicles, or hold schools; nor were any to maintain those who did. All persons having such books or writings, were to deliver them to the diocesan within forty days from the proclamation of this statute; and those who did not so deliver them, or who otherwise offended against this act, and all those defamed and evidently suspected thereof, were to be arrested by the direction of the ordinary, and committed to prison till they canonically purged themselves, or abjured their opinions. The ordinary was to proceed according to the canonical decrees, and determine the matter within three months from the arrest. If the party was canonically convicted, he was to be confined in prison at the discretion of the ordinary, and moreover *to be put* to the secular court (except in cases where, according to the canonical decrees, he was entitled to exemption), to pay a fine to the king; which fine was to be assessed by the diocesan, and certified to the exchequer, to be levied by process from thence.

Thus far of those canonically convicted; but farther, if persons sententially convicted refused to abjure their opinions, or after abjuration relapsed, a more rigorous course was directed. Such persons were by the canons to be left to the secular arm; and it was now enacted, that in such cases *credence should be given to the diocesan*, or his commissary, and the sheriff, and mayor or bailiff of the place,

should be present when the sentence was given, if required by the diocesan or commissary; and, after sentence promulgated, should receive, *and them before the people in a high place cause to be burnt*, to the example and terror of others. It is observed respecting this first statute against the preachers of new opinions, that the print differs materially from the record, so as to give a sharper edge to this proceeding (a).

We find it recorded in this same parliament, that a writ was sent to the sheriffs of London for the burning of *William Sawtree*, clerk, convicted by the clergy (b). This was according to the ancient course, by issuing the writ *de hæretico comburendo*; for the new method directed by this act put the whole authority into the bishop's hands; and as he might direct his sentence to be executed without the writ, the persecution against the followers of *Wickliffe* was likely to be more warm than before. In the 8th year of the king the prelates procured a long and sanguinary bill to be exhibited in parliament against the spreaders of new opinions, under the name of *Lollards*. This bill was to empower every officer or minister whatsoever to apprehend and enquire of such Lollards, and that no sanctuary should be allowed them. But the churchmen were not gratified in this instance (c). In the 11th year it was prayed by the commons, that persons arrested under stat. 2 Hen. IV. might be bailed, and freely make their purgation, and that they might be arrested by none but sheriffs, or the like officers, nor any havock be made of their goods; but this intended relaxation of the new course against heretics was not passed into a law (d).

The notion of producing gold out of other metals, by a chemical process, and the infatuation with which these vain hopes were pursued, occasioned a law to be made in this reign against these experiments. This

(a) Cott. Abridg. p. 409. § 48. (b) Ibid. p. 407. § 29. (c) Ibid. p. 456. § 62. (d) Ibid. 472. § 29.

process was sometimes called *multiplication*, and to *multiply*, because it was with a view to increase the quantity of metals, though in reality it seldom had any other effect than diminishing that which the credulous adventurer possessed before the operation began. The pretence of possessing this secret of changing metals had been practised by cheats, to draw supplies out of the pockets of the weak and ignorant; and had been ridiculed, before this time, in one of Chaucer's Tales (*a*). Besides the mischiefs here mentioned, which, perhaps, might be better left to experience to correct, without making them the object of legislative notice, it is most probable that this imposture was many times held forth as a cover to the real operation of coining base money, in which light it became a matter of serious and national concern. It was for this reason, and perhaps under some small apprehension lest the process of changing metals might by possibility succeed, that it was enacted by stat. 5 Hen. IV. c. 4. that any one who multiplied gold or silver, or used the craft of multiplication, and was attainted thereof, should incur the pain of felony.

Because many persons had lately been beat and maimed, and afterwards had their tongues cut out, or their eyes put out, it was by the same statute (*b*) made felony for any one so to cut tongues, or put out the eyes of any one, if it was proved to be done with malice prepense. This shews that mayhem was not now considered as a felony of life and limb; for though cutting out tongues did not come under that construction, yet putting out eyes was a mayhem at common law (*c*). These were all the felonies enacted in this reign. The misdemeanors, besides what may have been mentioned in different parts of this reign, were few. The statute 12 Ric. II. c. 6. (*d*) against unlawful games, was

(*a*) A person who had been tricked of his money in this way, after a minute account of the process and the deception, is there made to say, "*Lo, which advantage is to MULTIPLIE!*" Cant. Tales, vol. iii. p. 95. Edit. Tyrwh.

(*b*) Ch. 5. (*c*) Vid. ant. vol. II. 34, 35. (*d*) Vid. ant. 170, 171.

confirmed by stat. 11 Hen. IV. c. 4. and it was moreover ordained, that labourers and servants offending against it should be imprisoned for six days. All mayors, bailiffs, and constables of towns were to put this statute in force.

Several laws were made to regulate criminal proceedings. The *appeals* in the reign of Richard II. brought against lords and others, were of a singular nature, and probably occasioned the stat. 1 Hen. IV. c. 14. which states, that many and great inconveniences had arisen heretofore from appeals. To prevent the like in future, it provides, that all appeals of things done within the realm should be tried and determined by the good laws of the realm; and of things done out of the realm, before the constable and marshal of England. No more appeals were to be in parliament.

The too easy granting of pardons to provors Pardons to
provors. was restrained by stat. 5 Hen. IV. c. 2. This act states, that divers common and notorious felons would, upon their arraignment, in order to save their lives, become provors; so that in the mean time by brockage, grants, and gifts to be made to several persons, they might obtain their charters, and after their deliverance become more notorious felons than they were before. To prevent this, the act provides, that if any person sued for a pardon in such case, his name should be inserted in the charter, with mention that it was granted at his instance; and if the provor became afterwards a felon, the person suing the pardon was to forfeit 100l. (a).

Some circumstances relating to the personal *Insidiatores
viarum, &c.* benefit of clergy were settled and explained. It was stated by stat. 4 Hen. IV. c. 2. that the king was willing to be gracious to the clergy in their affairs, in return for the part they had taken in his favour when he came to

(a) Vid. ant. vol. II. 464.

the crown; and therefore he confirmed in the fullest manner the statute *de clero*, 25 Ed. III. and further, considering that the words *insidiatores viarum, et depopulatores agrorum* (which had been mentioned in a petition of the clergy to parliament) were not commonly used in indictments in the time of Edward III. and his progenitors; and being willing, for the quiet of the people, to avoid such novelties, he caused it to be enacted, that such words should not be used in indictments, arraignments, appeals, or any other impeachments; and though indictments to that effect might be taken, neither those words, nor words to that effect, should prevent any one from having the privilege of holy church, but they should be delivered to their ordinaries without any impeachment (a). As the Lollards were stigmatized with the suspicion of being disorderly vagabonds, who wandered about the country doing great mischief, the above general charge was contrived to be inserted in indictments against *them*; and it had been the opinion of the judges, that persons so convicted should be deprived of their clergy. In the next chapter of the same statute it is recorded, that the archbishop of Canterbury, for himself and the other bishops, had promised the king, that whenever a clerk religious, or secular, convicted of treason not touching the king, nor his royal majesty, nor a common thief, and so notoriously holden should be delivered to the ordinary as such, that the ordinary should keep him safely and surely, and according to a constitution provincial *to be* made by the archbishop and bishops, in pursuance of letters of the late archbishop, dated 12th Mar. 1351 (b), in which constitution were to be ordained certain pains for the observance of it; and it was enacted, that no such convict should make his purgation contrary to the form of that constitution. The constitution here mentioned was to be shewn to the king in this parliament, but there is no evidence that it was even made.

(a) Ch. 2. (b) Vid. ant. vol. II. 463.

All the acts that have hitherto been mentioned, requiring jurors to be of a particular description and qualification, related only to those jurors who tried issues; but some presentments having lately been made at Westminster by outlaws, and sanctuary-persons, not properly returned by the sheriff, it was provided by stat. 11 Hen. IV. c. 9. that no indictment should be made but by inquest of the king's lawful liege people, returned by the sheriffs or bailiffs of franchises, without any nomination to the sheriffs or bailiffs of franchises of the persons that should be returned, except by the officers sworn and known; and all indictments contrary to this act are declared void. Notwithstanding the many alterations made in the qualifications of jurors in subsequent times, and the solicitude shewn to chuse them from among those that were thought, from their rank and character, to be above temptations to corruption, nothing further was provided respecting those jurors who found indictments.

Because the people of the county of Chester committed felonies in the neighbouring counties, and then escaped into that principality, it was ordained, that process of exigent should be issued against such persons in the county where the fact was done: if they escaped into the county of Chester, the outlawry or exigent was to be certified to the officers and ministers of that county, who should take the party, and seize his lands and goods as forfeit to the prince or lord of the principality, the king still having his year-day and waste; but the lands out of the principality were to go as those of persons living in other counties. The same method was to be observed in case of trespasses committed out of the county of Chester.

The last statute in this reign (a) made some alteration in the summary method which had

Riots.

(a) Stat. 13 Hen. IV. c. 7.

lately been devised (*a*) to suppress and punish rioters. It was thereby ordained, whenever any riot, assembly, or rout of people was made against the law, that the justices of the peace, three, or two of them at the least, and the sheriff and under-sheriff, should come with the power of the county (if need were) to arrest them, and should have authority to record what they found done in their presence against the law; by which record the parties were to stand convicted, in the same manner as had been before provided by the statute of forcible entries (*b*). If the offenders were gone before the justices and the sheriff came, then they were to inquire within a month after the fact, and hear and determine it according to law. If the truth of the matter could not be found in the above way, they were to certify the king and his council of the matter; which certificate was to have the force of a presentment by twelve men; the offenders were to be put to answer thereon, and, if found guilty, were to be punished at the discretion of the king and council. If the parties traversed the matter so certified, the certificate and traverse were to be sent in to the king's bench, and there tried and determined. If the offenders did not appear before the council, or in the king's bench, at the first precept, then a second was to issue; and if they were not found, then the sheriff, or under-sheriff, was to make proclamation in the full county next ensuing the delivery of the second precept, that they should appear in the council or king's bench; or, if in time of vacation, in the chancery, within three weeks then next following; and if they did not appear, they were to stand convicted. The justices dwelling nearest the place, with the sheriffs and justices of assise, were to execute this statute, under the penalty of 100*l.* for every default.

The above act tended to increase the authority of justices of the peace, who were daily growing in consequence,

(*a*) Vid. ant. 202.

(*b*) Vid. ant. 202.

many matters relating to the police being submitted to their cognizance by different acts of parliament. This authority was sometimes abused. We find that constables of castles would get themselves to be assigned justices of the peace, and under colour of that commission would imprison in their castle those whom they wished to oppress, till they made fine for their deliverance. It was for this reason ordained by stat. 5 Hen. IV. c. 10. that none should be imprisoned by justices of the peace but only in the common gaol, with a saving to such lords as had franchises. Thus far of the alterations made by statute in this reign.

Out of the decisions of courts during this reign, we shall select for consideration the ^{Actions upon the case.} single head of actions upon the case, and some few alterations in our criminal law. To return to any of the topics that have been so recently and so fully canvassed, seems entirely unnecessary at present. When we have made some further advance in our History, they will be of course reconsidered, and many of them placed in a new point of view.

During the reign of this king, actions upon the case had grown very common. We find this action brought—for disturbing a way—against an ostler for horses lost—for negligently keeping fire and burning the plaintiff's house—for not infeoffing after promise—for not doing suit—for selling bad wine—for not repairing banks—for enticing away a servant—for keeping a school near an ancient one (a).

These writs of trespass were not only applied to a variety of new cases, but they were likewise more nicely considered, and their peculiarities better understood. In the reign of Henry IV. we find the term of *trespass sur le case* in familiar use: before, they were more usually called actions of trespass simply; but the marks of discrimination between *trespass* and *trespass upon the case* began now to be

(a) The year-book of Henry IV. passim.

distinctly ascertained. It was held, that the former must always be *vi et armis*, the latter never. The nature, however, of injuries is often so complex, and their consequences so various, that the truth of a matter sounding in case, could not be properly set forth without sometimes alleging circumstances which carried evident *force* in them: therefore, in 12 Hen. IV. where an action on the case was brought for stopping a sewer, so as several acres of ground were flooded, it was held good that the stopping the sewer was laid *vi et armis*, that being a malfeasance, and the remote cause of the injury sustained by the plaintiff; though the consequential damage, which was the immediate cause, and the gist of the action, was in case (a); a distinction which was many years after adopted as a just one. It was then laid down, that the *causa causans* (as they called it) might be forcible, as in this instance of stopping the sewer, and be laid *vi et armis* even in an action upon the case, though that action is properly grounded upon the *consequence* of such stoppage: this consequence they distinguished by the appellation of *causa causata*.

This was the manner in which they refined on this new action. It was in its conception so near of kin to the action of trespass, that it required no small degree of sagacity to perceive the instances in which the old form failed, and it was necessary to make a special writ. The cases in the reign of Edward III. and those in this period, which we have hitherto considered, are founded upon *malfeasances*, or such instances of *neglect* as were in the nature of a malfeasance; both which were so much *in the like case* (according to the requisition of the statute of Westminster) with the old writ of trespass, that the admitting of them to be objects of this special writ of trespass was obvious and easy.

Of *assumpsit*. But the action upon the case was found so convenient a remedy, that it was wished to ex-

(a) 12 Hen. IV. 3.

tend it still further. They wanted to apply it to cases of *non-performance of promises*; but these did not so kindly fall within the analogy of former instances. It was thought somewhat harsh to give the name of trespass to a thing which was never *done*; it took therefore some time, and needed the concurrent force of some strong motives to induce the courts to admit these new writs. The present state of the remedies in use, where contracts were not performed, operated, very probably, towards gaining a support for these new actions upon the case. If a man performed not his covenant, an action of covenant lay; but it had been long held, that an action of covenant must be grounded on a specialty; so that where the parties had not so bound themselves, that remedy failed. If a man did not pay money which he owed, the remedy was by action of debt; in which the defendant might discharge himself by wager of law, unless the demand was founded upon a specialty: the same in detinue, which indeed was only another form of the action of debt. To obviate these and the like defects, and to legitimate an action of a more effectual nature in matters of contract, was worth the attempt. Several actions of this kind were brought into court, before they were allowed and authenticated by a judicial decision in their favour.

The first case of this kind, upon record, was in 2 Henry IV. It was an action against a carpenter; *Quare cum, &c. assumpsisset, &c.* to build a house within a certain time, he had not done it. It was objected, that this was in covenant; and as no writing was shewn, the action must fail. This was supported also by *Brian*, who at the same time conceded, that perhaps if the writ had said that *the work had been begun*, and had afterwards *through negligence* been stopped, it might be otherwise; thereby adhering to former determinations respecting *malfeasances* and cases of *negligence*. He pronounced, however, this remedy inadequate where the contract was *executory*, and where the only complaint against the defendant would be for his *non-fea-*

sance or non-performance. The cause was dismissed on the above objection (a). In the 11th of the same king there was exactly the same case before the court: the same objections were raised, the same concession was made, but in plainer terms; and the cause was dismissed on the same grounds as the former (b). Thus the court seemed to have determined against the very conception of this kind of action. It is remarked upon this case by an author of later times (c), that in these cases there was no consideration alleged; that it was *nudum pactum*, and therefore the action could not lie; which, it cannot be denied, may be an additional objection, but it was not taken at the time, and the cause appears by the report to have been dismissed both times upon the same defects, namely, the want of a written covenant; and the prevailing opinion, which confined these actions to instances of malfeasance and negligence, where the defendant had really *done* something.

It must be observed of these determinations, that they left all persons who had made agreements without deed (for, if a mere writing, it could not be declared on in covenant), and where nothing had been done to execute the contract, entirely without redress. It is not improbable, that the repeated decision of this point might have driven parties so circumstanced into chancery, where they could have these agreements decreed to be specifically performed. This, perhaps, as well as other considerations, might incline the courts to review this grand point, and try if they could accommodate the notions of law, as then understood, to the exigency of the occasion; and thereby not only draw back into its proper channel the current of decision from the chancery to the courts of common law; but, by rendering this action more general, put the nation in possession of what was then much wanted, a more effectual common-law redress in matters of contract. This was not accomplished till some years after.

(a) 2 Hen. IV. 3. b. (b) 11 Hen. IV. 83. (c) Bro. Act. sur Case, 40.

The criminal law, as practised in this reign, was in general governed by the same principles and rules as in the reign of Edward III.

Some few points are now to be met with in the criminal law. The books which did not before occur, and others that somewhat deviate from the more ancient practice: of the former sort is the account given in the first year of Henry IV. of the trial of a peer. In all cases of life and limb, the lords possessed a judicature, by which every peer had, according to *Magna Charta*, a right to be tried. In this capacity the lords acted as judges, and sat as in a court, being bound to hear and determine according to the rules of the common-law. This judicial character, it should seem, was supported with more scruple, and with a closer attention to legal formalities, than their parliamentary one, where they often decided on the lives of men without any evidence of guilt, or even the pretence of a trial (a). The proceedings on the trial of a peer are thus related in a case that happened in the beginning of the reign of Henry IV. An indictment of treason had been found against a peer, under a commission directed to the lord mayor and others for that purpose: after this the king granted a commission to an earl, reciting the above facts, and that the place of steward of England was vacant, and thereby appointing him to that office, to do right to the lord indicted, commanding all lords to attend, and the constable of the Tower to bring his prisoner before him. The trial was held in Westminster-hall, where the steward sat under a cloth of state, the lords sitting down the hall on each side, and the judges round a table in the middle. The justices then delivered in the indictment; which on that occasion was confessed by the defendant, and judgment accordingly given: but, says the book, if it had been denied, the steward was to begin with the lowest lord,

(a) Vid. ant. 185.

and ask all their opinions *upon their conscience*, without administering an oath (*a*).

Some points on the law of principal and accessory, are also to be found in the books of this period. We have seen the prevailing doctrine in the reign of Edward III. was, that an acquittal or pardon of the principal should operate in favour of the accessory (*b*). Thus it was now held by *Thirning*, justice, that where a man was indicted, and cleared, either by pardon, clergy, or abjuration, the accessory should not be arraigned; for it was a settled rule, that wherever the principal was saved by law, the accessory should go quit (*c*); and so the law continued to be understood in after-times. So strictly were persons held to the observance of the legal dependence between the character of the principal and accessory, that where a principal was attainted at the king's suit upon an indictment, the accessory could not be put to answer in an appeal at the suit of the party (*d*), for both must be attainted at the suit of the same person. If a principal was found guilty of homicide *se defendendo*, it was held, that the accessory should not be arraigned (*e*). The general tenor of cases in the reign of Edward III. seems to indicate that a person being present, aiding and assisting, was considered only as accessory; but the opinion of lawyers seemed now to have altered, and a person who was present, aiding and assisting, at a murder, was held to be a principal (*f*). If a person taken by process died in prison, the coroner was always to view the body (*g*).

We have seen, that the petty jury, when they gave a verdict of acquittal on an indictment of homicide, used to be required to say *who* was the person that really committed the fact (*h*). It had now grown into practice not to require this, unless the indictment had been found before

(*a*) 1 Hen. IV. 1. (*b*) Vid. ant. 125, 126. (*c*) 7 Hen. IV. Bro. Cor. 18.

(*d*) 7 Hen. IV. 27, and 35. (*e*) 11 Hen. IV. 93. (*f*) 7 Hen. IV. 27. 35.

(*g*) 3 Hen. V. Bro. Cor. 168. (*h*) Vid. ant. 121.

the coroner (*a*). That officer being in duty bound to find who had committed the murder, it seems, as if the law expected the jury, who tried the traverse, and had defeated his inquisition, to supply it by finding another. It was decided, that justices of the peace could not assign a coroner, if a person indicted before them was desirous of becoming a provor (*b*); such an appeal being adjudged void by the court of king's bench. A person was appealed by three different provors, and having vanquished one, he was, very properly, declared to be acquitted as against all (*c*).

There was great care taken, that a person once acquitted should not be again arraigned for the same offence. But where the first arraignment was, either without an original, or with a bad one, he might be newly arraigned at the suit of the king. However, if the original was good, whether it was an appeal or indictment, he could not afterward be arraigned, though the mesne process, or return, was ever so bad (*d*). In like manner, if the plaintiff was nonsuit in his appeal, the defendant might be arraigned at the king's suit (*e*). It was held, that where a felon was within the benefit of a statute-pardon, the court were *ex officio* to decline arraigning him, though he made no claim (*f*) of it. A man was convicted of robbery, in an appeal at the suit of the person robbed, who released the *execution*; and afterwards the king also, reciting the release, pardoned the *execution*: this was held to be no pardon of the *felony*, which must be expressly named (*g*). We find it laid down for clear law, that an appeal of murder could not be brought beyond a year and day from the fact; which seems to imply that all other appeals might be commenced at a more distant period (*h*).

(*a*) 11 Hen. IV. 93.

(*b*) 9 Hen. IV. 1.

(*c*) 11 Hen. IV. 93.

(*d*) 9 Hen. V. 2.

(*e*) 11 Hen. IV. 41.

(*f*) 11 Hen. IV. 41.

(*g*) 8 Hen. IV. 22.

(*h*) 12 Hen. IV. 3.

Peine forte et dure. The severe penance to which prisoners were subjected, if they refused to plead, was now inflicted in a different manner from that which is described in Fleta and Britton (a). They were now to be put *en diverses measons bases et estoppes, que ils gisent par la terre touts nuds forsque leur braces, que il mettroit sur chacun deux tant de fer et poids quils puissent porter, et plus, issint quils ne puissent lever, et quils naver ascun manger, ne boire, si non le plus pier pain quil puissent trouver, et de leau plus pres al gaole (excepte eau courant) et que le jour quils ont pain quil nayent de leau, et e contra, et quils GISENT ISSINT, TANTQUILS FURENT MORTS* (b). Thus, they were to lie under a *peine* (for so it was now called instead of *prisone*, which is the word in the statute) *till they were dead*, an event that was likely soon to follow from the account here given of the weights to be placed upon them. By what authority this proceeding was altered between the time of Fleta and the reign of Henry IV. can only be determined by conjecture. It is probable, so material a change in judicial proceedings as one which affected life, would not have been hazarded without the sanction of the executive power at least, if not of parliament; but no mention is to be found of any such order or direction. In later times we find (c) a further alteration in the mode of compelling prisoners to stand a trial; and if an authority had been given by parliament or the council for this second change, it is less likely that no trace of it should be left, as it must have been given since the reign of Henry IV. when public memorials have been kept with more security than in earlier times. Whatever was the authority for the first change, the motive to it has been thus accounted for: It has been thought to arise from the justices in eyre and justices of gaol-delivery not staying above two or three days

(a) Vid. ant. vol. II. 136. 137.
bridge 1471.

(b) 8 Hen. IV. 1.

(c) At Cam-

in a county-town, who therefore could not wait for the tedious method, before used, of forcing the criminal to plead, as it lasted sometimes forty days (*a*); the probability and justness of which conjecture must be determined by the reader.

If a person charged with felony stood mute, it was usual to impanel a jury *ex officio*, to try whether this silence was a device of the prisoner, or an infirmity that had actually fallen upon him; in order that so grievous a punishment might be inflicted on none who were disabled by the visitation of heaven (*b*). It had now become a settled practice to inflict the *peine forte et dure*, as well in appeals, as upon indictments (*c*); a point concerning which there seems to have been (*d*) some difference of practice in the reign of Edward III.

There appears nothing remarkable in the reports of this reign, relating to the description of offences: these stood generally upon the foot of determinations in the reign of Edward III. However, we find the following point of treason. A man had taken the seal of an old patent, and put it to a new commission, by authority of which he collected much money, and otherwise imposed upon the world: this was held to be forging the king's seal, and the offender was accordingly drawn and hanged (*e*). It seems to have been long agreed, that lands entailed were not to be forfeited for treason (*f*), and of course not for felony. Where a man had a felon in his house, and permitted him to depart, this was held to be no escape of a felon, because he had not arrested him for felony (*g*): and again, where a man was struck, and afterwards died of the plague, the offender who escaped out of the custody of the constable, was adjudged not to be guilty of felony (*h*).

(*a*) Barr. Stat. p. 86.

(*b*) 8 Hen. IV. 3.

(*c*) 8 Hen. IV. 1, 2.

(*d*) Vid. ant. 134.

(*e*) 2 Hen. IV. 25.

(*f*) 7 Hen. IV. 32.

(*g*) 9 Hen. IV. 1.

(*h*) 11 Hen. IV. 12.

The king and government. It does not appear that our jurisprudence was under any particular obligation to this king. After the reign of Richard II. it was an advantage that the reigning prince had no prejudices against the ancient common law. The law in general was suffered to take its course. If it was ever turned aside from its proper direction, it was in the instance of certain obnoxious persons who were to be destroyed by this instrument, as one more effectual and safe than open violence.

In the 6th of Henry IV. that monarch did not scruple to proceed against the archbishop of York for rebellion and treason. Sir William Gascoigne, the chief-justice, having some doubt about acting in so hazardous an enterprize, the king appointed Sir William Fulthorp for judge, who pronounced sentence of death, which was followed by immediate execution. This seems to have been with very little formality of trial, and is the first instance, in this country, of a capital punishment inflicted on an archbishop. The earl of Nottingham was condemned in a like summary manner. In the following reign, the earl of Cambridge, some other lords, and Sir Thomas Grey, were indicted by a jury of commoners of high treason. The evidence upon the indictment was, that the constable of Southampton castle had sworn, that they had separately confessed their guilt to him. Upon this evidence Sir Thomas Grey was executed. But the lords pleading their privilege, the king thought proper to summon eighteen barons, with the duke of Clarence as their president, to try them. The evidence given to the jury had been put into writing, and was now read to the lords: it does not appear that the prisoners were even produced in court; but they were in this manner convicted and accordingly executed (a).

The statutes. Several statutes were made in the reign of Richard II. without the assent of the com-

(a) Hum. vol. III. 97.

mons; but they had acquired during that reign an ascendancy which gave them importance; and in the 1st of Henry IV. though foiled in their attempt to share in the judicial department of the lords, they drew from that house, as we have seen, an express resolution that they had a legislative authority in all statutes, grants, and subsidies (*a*). This was a declaration expressly in favour of their right. It was, nevertheless, so little regarded in practice, that in the very next year it was invaded; for the famous statute 2 Hen. IV. c. 15. against Lollards was passed without the assent of the commons, who are said to have expressly protested against it (*b*); notwithstanding which, this act has always been held to be an act of parliament, and was occasionally enforced as such, till repealed in the reign of Henry VIII. It was afterwards revived, and carried into severe execution, in the reign of Philip and Mary, but was finally repealed in the reign of queen Elizabeth.

Instances like this produced the petition in the 8th of Henry IV. in consequence of which it was enacted, at the request of the commons, that certain of the commons' house should be present at the ingrossing of the parliament-roll. The grievance complained of was not remedied entirely by this precaution. It had got into practice, upon entering the bill on the statute-roll, to make additions, diminutions, and alterations, whereby the act was made to vary, and that sometimes materially, from the substance of the commons' petition; and the roll was not unfrequently drawn up directly contrary to their sense and intention (*c*). A practice like this required redress. The commons remonstrated in 2 Hen. V. and contended, that considering they were as well *assertors* as petitioners, statutes should be made according to the tenor of the writing of their petition, and not altered. We do not find that this representation of the commons produced any answer or immediate correction of the cause of complaint.

(*a*) Vid. ant. 227.

(*b*) 4 Inst. 51.

(*c*) Vid. Cotton's Abrid. Table, Statutes, &c. and Vid. ant. 145, 146.

The year-book of this king's reign is complete: and many cases are likewise to be found in *Jenkins* and *Benloe*. The reports of Henry IV. as they contain matter that bears a nearer affinity to the state of our laws at this day than the books of Edward III. are more likely to engage the attention of a modern reader. Their form is less irksome, and the subject more intelligible; they have less the style of an entry than the old reports, and give a state of the case, and what was said upon it, more in the way of a narrative. Notwithstanding these advantages in their favour, it is the opinion of a learned writer (a), that the reports of this reign, as well as those of Henry V. do not arrive, either in the nature of the learning contained in them, or in the judiciousness and knowledge of the judges and pleaders, or in any other respect, to the perfection of those in the last twelve years of Edward III.

(a) Hal. Hist. 175.

CHAP. XIX.

HENRY V.

Qualification of Electors—The Clergy—The Statute of Additions—Statute of Amendments—Laws against Heretics—Forging of Deeds—Riots—Of Truce and Safe-Conduct—The King and Government.

THE few changes made in the law by parliament during this military reign, consist principally in such provisions as were framed to promote the design of several statutes passed in the time of the two preceding princes. The election of knights and burgesses, the punishment of provisors and heretics, and the suppression of riots, were favourite objects in this, as they had been in the two former reigns. The statutes upon those, and some few other articles of reformation, constitute the whole of the juridical history of this reign; the decisions of courts, during nine years, furnishing nothing of any great importance.

The statutes hitherto mentioned concerning the representatives of the people, relate to the ^{Qualification} mode of election (a). The first act in this king's reign is to ascertain the *qualifications* of the *electors* and person to be *elected*. Knights of the shire, says the act, shall not be chosen unless they are resident within the shire the day of the date of the writ of summons; and the knights, esquires, and others, who are to be choosers of the knights of shires, are to be resident within the shire in the manner and form aforesaid. Again, citizens and burgesses of

(a) Vid. ant. 220.

cities and boroughs are to be citizens and burgesses resident, dwelling, and free in the same, and no other person nor in any other manner whatever.

We have seen, that in the last reign vicars ^{The clergy.} were established in possession of their benefices (*a*); we now find an act for limiting the salaries of curates and chaplains; the former were to have eight, and the latter but seven marks per annum (*b*). The subject of provisors, and the possession of ecclesiastical benefices by aliens, occasioned several acts in this reign. The stat. 13 Ric. II. c. 3. prohibiting *Frenchmen* from holding church benefices, was enforced by stat. 1 Hen. V. c. 7. with an exception of priors alien conventual, and other priors having institution and induction, so as they were catholic, and found surety not to disclose the secrets of the realm. The penalties of a *præmunire* were inflicted by stat. 3 Hen. V. c. 4. on persons obtaining provisions, licences, or pardons, against the statute 7 Henry IV. c. 8. (*c*). The same jealousy which had been long entertained of foreign churchmen in this kingdom, was shewn by the Irish parliament in the last reign; when they passed an act prohibiting the Irish people from accepting any church benefice whatever: by the *Irish* were meant, those original inhabitants of the country who had almost always been in a state of resistance to the English settlers. This act of the Irish parliament was now confirmed by the stat. 4 Hen. V. c. 6.; and further, if any archbishop, bishop, abbot, or prior of the Irish nation, made any collation or presentment contrary to that act, or brought with them, as servants, any Irish rebels to parliament, to learn and discover the secrets and state of the English, it was ordained, that their temporalities should be seized into the king's hands till they had made fine to the king.

Fees for the probate of testaments were settled by stat. 4 Hen. V. c. 8. By another act, the ordinary was em-

(*a*) Vid. ant. 222. (*b*) Stat. 2 Hen. V. st. 2. c. 2. (*c*) Vid. ant. 223.

powered to inquire into the government of hospitals; and if they were of the king's foundation, he was to certify the state of them to the chancery; if of another's foundation and patronage, then he was to make correction and reformation according to the laws of holy church (a).

One statute was occasioned by the old dispute about ecclesiastical jurisdiction. Complaint had been made to parliament, that persons were sued in the ecclesiastical court, as well for matters touching freehold, debt, trespasses, covenants, and other things (the cognisance of which belonged to the king's court), as on questions matrimonial and testamentary; and when a person appeared upon citation and demanded a libel, in order to be informed what he was to answer, or purchased a writ of prohibition, the libel used to be denied. That persons might not, in this manner, be deprived of their remedies at common law, it was enacted by stat. 2 Hen. V. st. 1. c. 3. that the libel should be delivered to the party, without difficulty, at the time when by law it was grantable.

Some amendments were made in the course of process and proceeding. We have seen what remedy was given by statute in the time of Edward III. for persons whose goods were seized as the goods of an outlaw by mistake of the sheriff (b). The great use of the writ *de idemptitate nominis* was to ascertain whether the person so injured was the party really meant by the exigent. To make this process more accurate and certain, it was prayed in the last reign, that no man might be outlawed without his surname, and the name of his town and county (c). At length a statute was passed to ascertain this matter, and it was enacted by stat. 1 Hen. V. c. 5. that in every original writ of actions personal, appeals, and indictments, in which the exigent shall be awarded, to the names of the defendants *additions* should be made of their estate or degree, or

(a) Stat. 2 Hen. V. st. 1. c. 1.

(b) Vid. ant. vol. II. 374.

(c) Cott. Abri. p. 422. § 83.

mystery, and of the towns, or hamlets, or places and counties of which they *were*, or *be*, or in which they be or were conversant, otherwise the outlawry to be void; and before the outlawry pronounced, the writ and indictment may be abated by exception of the party. It was also provided, that though the writs of additions personal were not according to the records and deeds, if such addition was surplusage, the writ should not be abated on that account. The clerks of the chancery, if they left out such additions, were to be punished, by fine, at the discretion of the chancellor. This *statute of additions*, as it was afterwards called, removed those inconveniences that used to be occasioned by the want of naming particularly the parties in a writ.

The statute of
amendments.

A statute of *jeofail and amendment* was made, in order to remove some doubts which had arisen upon stat. 14 Ed. III. st. 1. c. 6 (a). It was ordained by stat. 9 Hen. V. c. 4. that the justices before whom such plea or record was made or was depending, should have power and authority, as well by adjournment as by way of error, or otherwise, to amend such record and process, according to the permission of the former statute, as well *after* judgment as *before*, so long as the record was before them. Thus this act did no more than extend the powers of the statute of Edward III. by allowing such amendments to be made *after* judgment. In the second year of the king, a statute had been passed to secure plaintiffs in the full fruits of a judgment obtained. It had been common for defendants in custody on execution, to sue out a *certiorari* or *corpus cum causâ*, and when brought before the chancellor, they would be discharged upon bail or mainprise, and sometimes without either, against the will of the plaintiffs, whom they thus defeated of their judgments: to prevent this, it was enacted by stat. 2 Hen. V.

(a) Vid. ant. vol. II. 448.

st. 1. c. 2. that if upon such writs it was returned, that the person was a prisoner on a judgment, he should be remanded immediately, and there remain without bail or mainprise till he had agreed with his plaintiff.

Another regulation was made by stat. 2 Hen. V. st. 2. c. 2. concerning the qualifications of jurors. The statute complains, that many were disinherited, because the persons who passed on inquests were "common jurors, " and others that have but little to live on but by such inquests, and nothing to lose on account of their false oaths, " whereby they offend their consciences the more largely:" it was therefore now provided, that none should be admitted to pass on inquests upon the trial of the death of a man, nor between party and party in pleas real, nor in a plea personal, where the debt or damage declared for amounted to forty marks, unless he had lands or tenements of the yearly value of forty shillings above all charges; and if he had it not, it was a cause for which either party might challenge him. Because the under-officers of sheriffs continued in their offices from year to year, it was found no easy matter for an injured person to obtain redress against them: it was therefore enacted by stat. 1 Hen. V. c. 4. that those who were bailiffs of sheriffs in one year, should not be in office for the three years next following, except bailiffs or sheriffs inheritable in their sheriffwicks; nor was any under-sheriff, sheriff's clerk, receiver, or sheriff's bailiff, to be attorney in the king's courts during the time he was in office with such sheriff. By stat. 9 Hen. V. c. 5. the stat. 14 Ed. III. st. 1. c. 7. concerning the appointment of sheriffs was dispensed with for a time; and the reason given was, that the late pestilences and wars had not left in the country sufficient persons of substance to answer the requisites of that act; the king therefore was authorized, during four years, to appoint sheriffs and escheators at his pleasure.

Laws against
heretics.

The whole secular power seems, at the beginning of this reign, to have been made subservient to the ends of the prelates in suppressing the Lollards. It was enacted by stat. 2 Hen. V. st. 1. c. 7. that the chancellor, treasurer, justices of both benches and of the peace, sheriffs, mayors, and bailiffs of cities and towns, and all other chief officers of places, should upon entering into their office take an oath, to use their whole power and diligence to destroy all heresies and errors, commonly called *Lollardies*, and assist the ordinaries and their commissaries as often as required by them, so as they paid their expences of travelling. Nevertheless they were enjoined by the act not to postpone the king's service to that of the church. Besides the penalties to which Lollards were before liable, they were now to suffer forfeiture of goods and lands, as in case of felony; only the lands such convicts held of the ordinary or his commissary before whom he was convict, were to be forfeit to the king; but no heretics thus left to the secular arm were to forfeit their goods till they were dead; in which particulars this new provision did not conform to the law of forfeiture for felony. The justices of the king's bench, of the peace, and of assise, were empowered to *enquire* (that is, take indictments) of Lollards and their maintainers, and award process; but because heresy was a spiritual offence, they were to deliver the party, when taken, to the ordinary by indenture, within ten days after the arrest, to be tried by the laws of holy church. The indictment was not to be used as evidence, but only for information before the spiritual judge, who was to commence his process, as if no indictment had been found. This was the famous act against the Lollards, upon which many of those people suffered. In the preamble they are loaded with the imputation of state crimes, as a pretence to delude the people into a concurrence with the churchmen in their persecution; they are said to be united in confederacies to destroy the king, and all other estates of the

realm, both lay and spiritual, *and all manner of policy, and finally the laws of the land*: so sensible were they that the charge alone of difference in religious opinions could not justify to the people such sanguinary proceedings.

Some statutes were passed relating to the coin. It was made felony by stat. 3 Hen. V. st. 1. c. 1. to make, buy, or import certain coin then prohibited by proclamation, called *gally halfpence, suskins, and dodkins*; and the payments in these coins subjected the party to certain penalties. Much doubt had arisen, whether clipping, washing, and filing, was an offence within the statute of treasons; and it was accordingly so declared to be, by stat. 3 Hen. V. st. 2. c. 6. and cognisance thereof, and of every other falsity of money, was given to the justices of assise: the justices of the peace, likewise, might still enquire thereof; that is, take indictments and issue process of *capias*, but no farther. The suspicions entertained of the treasonable practices of the Welch still continued; and it was enacted by stat. 3 Hen. V. st. 2. c. 3. that all such Britons dwelling in the queen's house, and others abiding near the house, and elsewhere, not made denizens, should be voided out of the realm by a certain day, under pain of felony. And because many *Welch* made inroads into Shropshire, Hereford, and Gloucestershire, and took away people by force, the justices of the peace were authorized by stat. 2 Hen. V. st. 2. c. 5. to enquire, hear, and determine such offences, award process of outlawry, and certify this to the lords of seignories where such plunderers harboured, who were to order execution to be done thereon. By another statute it was ordained (a), that all Irishmen and Irish clerks-beggars, called *chamber-deacons*, should be voided out of the realm by a certain time, on pain of losing their goods, and being imprisoned at the king's pleasure; excepting graduates in the schools, serjeants and apprentices of the

(a) Stat. 1 Hen. V. c. 8.

law, those who were inheritors in England, religious persons professed, merchants of good fame and their apprentices, and those with whom the king would dispense. All Irishmen having estates and benefices were to dwell on them. This act is stated to be made for the quiet and peace of England, and the increase and restoring of Ireland.

The law respecting forgery, as stated by our old writers (a), seems to have become obsolete, as a statute was now made, imposing a less penalty than the old law, and yet adding something to the then existing law. It is said by stat. 1 Hen. V. c. 3. that people possessed of lands or tene-

ments suffered losses, because persons *subtilly* Forging of deeds. *imagined and forged anew divers false deeds and muniments, to trouble and charge their lands*: it was enacted, that a person so injured should have recovery of his damages against the party making and publishing, who was also to make fine at the king's pleasure. This was substituting a civil in the place of a criminal proceeding.

Several laws were passed to facilitate the execution of process against offenders living in places where the king's writ did not run. Because felons living in *Tyndal* and *Hexham* escaped the process of the law, which could not be executed in those franchises, it was provided (b), that process should be made at common law, till they were outlawed; and when that was pronounced and returned before the justices, they were to certify it to the ministers of those franchises, who were immediately to seize the lands, goods, and persons of the offenders. This statute was afterwards extended to persons living in *Ridesdale*, another franchise (c). It was likewise provided (d), that persons outlawed in the county of Lancaster should not forfeit their lands or goods in other counties.

(a) Vid. ant. vol. II. 8.

(b) Stat. 2 Hen. V. st. 1. c. 5.

(c) Stat. 9 Hen. V. c. 7.

(d) Stat. 9 Hen. V. c. 2.

Respecting offenders in general, who absconded to avoid the process of the law, it was enacted by stat. 2 Hen. V. st. 1. c. 9. that where murder, manslaughter, robbery, battery, assemblies of people in great numbers, riots, and insurrections happened, and the offenders fled, and any one came to the chancery to complain thereof, a bill should be thereupon made; and the chancellor, after the bill to him delivered, if he was informed of the truth thereof, should have power to make a writ of *capias* at the king's suit, into the county where the offence was committed, returnable in chancery at a certain day. If the party was taken, or surrendered, he was to be put in ward, or mainprise, as the chancellor pleased; if not, and the sheriff returned that he could not be taken, then the chancellor was to make a writ of proclamation directed to the sheriff, returnable in the king's bench at a certain day, to make proclamation in two counties, for him to appear at the day, or stand convicted of the offence charged in the bill, the substance of which was to be contained in the proclamation; and if he came not by the return of the proclamation, he was to stand attainted. If the offence was a riot, the suggestion thereof was to be testified to the chancellor by letters under the seal of two justices of the peace and the sheriff, before the *capias* was to issue. If the fact happened in the county of *Lancaster*, or other franchise, where there was a chancellor and a seal, the chancellor was to write to the chancellor thereof all the suggestions in the aforesaid bill, commanding him to make execution in the above way.

In the preceding chapter of the same statute a Riots,
very special course was directed in case of *riots*.
It was found, that the persons intrusted with the execution of stat. 13 Hen. IV. c. 7. (a) concerning riots, were dilatory and negligent therein: it was now enacted, that should de-

(a) Vid. ant. 241.

fault be found in the two justices of peace, or justices of assise, and the sheriff and under-sheriff, then there should issue, at the instance of the party grieved, under the great seal, a commission, to inquire as well of the truth of the case and the original matter, as of the default of the justices and sheriff, to be directed to sufficient and indifferent persons at the nomination of the chancellor; which commissioners were to return presently into the chancery the inquests and matters found before them. The pannel was to be returned by the coroner, and the jurors to have lands of 10l. per ann. with severe issues and penalties on default. The chancellor, moreover, when he had knowledge of any riot, was to send a writ to the justices and sheriff, enjoining them to put the above statute of Henry IV. in execution; and the justices were to be paid by the sheriff the costs of suppressing such riots. Persons attainted of heinous riots were to be imprisoned for a year at least, without bail or mainprise; those attainted of petty riots, to be imprisoned as it should seem best to the king. All persons were to be assisting to the justices and commissioners, on pain of imprisonment and fine.

Because indictments in the county of Lancaster sometimes charged offences to be committed in places that did not exist, under pretence of some fabricated name to assume jurisdiction of the crime, it was provided by stat. 7 Hen. V. that the justices should, before the exigent on such indictment was awarded, inquire *ex officio* whether there was such a place; and if there was found to be no such place, the indictment was to be void, and the indictors punished by imprisonment and fine (a). It was at the same time declared, that process of *capias* and exigent, as in trespass, should lie against the forgers of false deeds.

(a) Because this statute was supposed not to be in force, it was re-enacted by stat. 18 Hen. VI. c. 12.

The authority of justices of the peace was further established by several acts. Justices were empowered by stat. 2 Hen. V. st. 1. c. 4. to send their writs to take fugitive labourers in any county. All the statutes of labourers were to be exemplified under the great seal; an exemplification was to be sent to every sheriff, to make proclamation in full county, and deliver it to the justices of the peace named of the *quorum*, to remain with them for the better execution thereof. It was further directed, that justices of the *quorum* should be resident within the county, except lords, justices of the two benches, the chief baron, serjeants at law, and the king's attorney, and that they should hold their sessions four times a-year; namely, in the first week after St. Michael, the Epiphany, the close of Easter, and the translation of St. Thomas the Apostle; and the justices were to hold their sessions throughout the realm in the same week every year. Justices were authorized by this act to examine labourers, servants, and artificers, with their masters, upon their oaths. Again, by stat. 2 Hen. V. st. 2. c. 1. justices of the peace were to be of the most sufficient persons dwelling in the county, except lords and justices of assise, and were to be named by the advice of the chancellor and king's council.

We must rank among the penal acts of ^{Of truce and} this reign a statute made in aid of the law of ^{safe-conduct.} nations, to punish the breach of *truce and safe-conduct*. This was stat. 2 Hen. V. st. 1. c. 6. It complains, that during the continuance of a truce, many people having the king's safe conduct had been slain, robbed and spoiled by the king's subjects, as well upon the main sea as within the ports and coasts of England, Ireland, and Wales; and such spoilers were abetted and received, to the breach of truces and safe-conducts, and the dishonour of the kingdom. It was now declared, that such manslaughter, robbery, spoiling, breaking of truce and safe-conduct, and voluntary receipt, abetment, procurement, concealing, hiring and sustaining

of them, as well by land as by sea, should be adjudged high-treason. The king was to assign by letters patent, in every port, a person to be called *a conservator of the truce and the king's safe-conduct*, who was to have power by such patent, and also by commission of the admiral, to inquire of all such treasons and offences upon the main sea out of the body of the counties, and out of the franchises of the *cinque* ports, and to punish all those indicted before him, at the king's suit, or that of the party, by such process, examination, proof, determination, judgment and execution, as the admiral might have done; saving the determination upon the death of a man, which was to be reserved to the admiral. Upon land, within the body of a county, he was to inquire of all the above offences, as well within liberties as without, and to make process by *capias* and *exigent*. Two persons learned in the law were to be associate in every commission made to such conservator, and they together were to make deliverances of gaols, according to the law of the land. The act contains some other particulars of less importance. Thus far of the statute-law in the reign of Henry V.

The king and government.

A prince like Henry, engaged, during almost the whole of a short reign, in the pursuit of conquest in a foreign country, could not be supposed to have any turn for the arts of legislation. The youthful sallies of this prince have furnished juridical history with an anecdote, that shews him to have once been a contemner both of justice, and of those who administered it.

The legal annals of this reign have come down to us imperfect; for of the year-book of this king, the third, fourth, and sixth years are wanting.

CHAP. XX.

HENRY VI. EDWARD IV.

Statutes of Henry VI.—Members of Parliament—Of the Council and Chancery—Statutes of Pernors of Profits—Attaints—Writs of Proclamation—Statutes of Jeofail—Juries—Sheriffs, and Execution of Process—Attornies—Treason to burn Houses—Process in criminal Causes—Forcible Entries—Statutes of Edward IV.—The Jurisdiction of the Tourn restrained.

THE history of such alterations as were made in the law by the decisions of courts, during these two reigns, is so intimately connected, that it will be extremely convenient to unite them into one period, and so consider them together. In the mean time, the alterations made by parliament are not so interesting or important, as to give a distinguished juridical character to either of these reigns, and to make it absolutely necessary that they should be treated separately. In the present chapter, therefore, we shall consider the statutes of both these kings, beginning with those of Henry VI.

The legislature in the reign of Henry VI. Statutes of
Henry VI. as in the times of his two predecessors, was rather employed in furthering and improving the policy of some statutes made in the preceding period, than in introducing any novelties.

The parliament made another law to restrain the emigration of the Irish into this kingdom. It was ordained by stat. 1 Hen. VI. c. 3. that those who did not leave the kingdom within a month after proclamation of that statute, should forfeit their goods, and be imprisoned at the king's

pleasure. It is remarkable that the Irish who principally created suspicion, were persons beneficed there, and scholars resorting to the university of Oxford. It was now ordained, that no scholar should enter England without a testimonial under the seal of the lieutenant or justices of Ireland, testifying that he was of the king's obedience; and if he did, he was to be deemed a rebel (*a*).

The article of *safe-conducts*, which had received some parliamentary sanction in the last reign (*b*), was again considered by the legislature; and several regulations were made for the better ordering of those public protections (*c*). After this, it was thought, so severe a penalty as that of high-treason imposed by stat. 2 Hen. V. st. 1. c. 6. on the violators of safe-conducts might be repealed (*d*).

Members of parliament. The election and privilege of members of parliament engaged some of the attention of the legislature in this reign. The importance which the lower house was daily assuming, made it necessary to enlarge and adjust the rights they claimed individually as members.

The first act concerning members of the lower house is stat. 6 Hen. VI. c. 4. and relates to their election. By stat. 11 Hen. IV. c. 1. (*e*) the justices of assise had been empowered to inquire by inquests of office of the return of members: it was now ordained, that such members and sheriffs as had inquests of office found against them, should be allowed to traverse them, and should not be damaged by such inquest till they were duly convict. In stat. 8 Hen. VI. c. 1. it was complained, that as well the clergy who came to convocation, as their servants and familiars coming with them, were commonly arrested and molested; to prevent which it was now ordained, that they and their servants should in future use and enjoy such liberty or

(*a*) Vid. stat. 2 Hen. VI. c. 8.

(*b*) Vid. ant. 266.

(*c*) Stat. 15 Hen. VI. c. 3. stat. 18 Hen. VI. c. 8. stat. 20 Hen. VI. c. 1. stat. 29 Hen. VI. c. 2. stat. 31 Hen. VI. c. 4.

(*d*) Stat. 20 Hen. VI. c. 11.

(*e*) Vid. ant. 221.

defence, in coming, tarrying, and returning, as the great men and commonalty called to parliament enjoyed. What was the privilege they enjoyed, may be partly inferred from the following case, mentioned in the rolls of the same year. It is there said, that a servant to *William Lake*, a burgess for London, being committed to the *Fleet* in execution for debt, was delivered by the privilege of the commons' house; but authority was given by the chancellor, to appoint by commission certain persons to apprehend him after the end of the parliament (a).

In the same year we find the famous act for fixing the qualifications of the electors and elected in county elections (b). The reason for this regulation is stated in the preamble of the act in the following words: "Because elections
" of knights of shires have now of late been made by very
" great, outrageous, and excessive numbers of people
" dwelling within the same counties; of the which most
" part was of people of small substance, and of no value,
" whereof every of them pretended a voice equivalent, as
" to such elections to be made, with the most worthy
" knights and esquires dwelling within the same counties,
" whereby man-slaughters, riots, batteries, and divisions
" among the gentlemen and other people of the county shall
" very likely arise, unless due remedy was provided." The remedy prescribed by the statute (c) is this: that the knights of the shire should be chosen by people dwelling and resident in the county, having free land or tenement to the value of forty shillings by the year at the least, above all charges. The persons chosen were also to be dwelling and resident within the county. The statute further provides, that he who had the greatest number of those who might expend forty shillings a-year as aforesaid, should be returned by the sheriff, by indenture sealed between the sheriff and the choosers; and the sheriff had authority given him to exa-

(a) Cott. Abri. p. 596. § 57. Vid. ant. 219. (b) Vid. ant. 220. 255.

(c) Ch. 7.

mine upon the Evangelists every such chooser, how much he expended by the year. If the sheriff returned any one contrary to this act, the justices of assise might enquire of it; and if the sheriff was attainted thereof by inquest, he was to forfeit one hundred pounds to the king, and to be imprisoned for a year without bail or mainprise: moreover, the knights were to lose their wages. In addition to the above affirmative designation of qualified voters, there was annexed, in abundant caution, this negative clause; that those who could not expend forty shillings per annum as aforesaid should not be choosers. It was further enacted, that in all writs to sheriffs to elect knights, mention should be made of this act.

It appears by the wording of this statute, that the qualification of electors was narrowed, and thereby numbers of the inferior people excluded; but what was the particular description of those people, and what was the qualification of electors before this act, is a question much agitated by writers on the constitution of parliament. To such writers we refer the reader, this being a point not within the compass of a work principally confined to subjects of a juridical nature. In the 10th year of the king (*a*), this new regulation received an amendment: for, as it was not specified whether the freehold should be in the county where the elector dwelt, it was now declared that it should. To prevent any personal insult to members of either house, it was enacted by stat. 11 Hen. VI. c. 11. that if any assault or affray was made upon a lord spiritual or temporal, knight of the shire or burgess, come either to parliament or to any other council of the king, and there attending, proclamation should be made for the offender to appear in the king's bench within a quarter of a year; otherwise he should stand attainted of the fact, and pay the party grieved his double damages (to be taxed by the justices or inquest), and

(*a*) Ch. 2.

should likewise be fined to the king. The method of levying the wages of knights of the shire was prescribed by stat. 23 Hen. VI. c. 11. They were to be assessed in the county-court, after proclamation for the attendance of the coroners and chief constables; and severe penalties were inflicted on sheriffs who failed in the levy or payment thereof to knights.

The order of electing members to serve for counties, cities, and boroughs, was re-considered in the 23d year of the king (*a*); when, reference being made to stat. 1 Hen. V. c. 1. (*b*) and stat. 8 Hen. VI. c. 7. it was ordained, that those acts should be fully observed. But because a sufficient penalty had not been provided, as a security for their observance, it was now enacted as follows: That every sheriff, after delivery of the writ to him, should make and deliver a sufficient precept under his seal to every mayor and bailiff within the county, reciting the writ, and commanding him by such precept to elect citizens and burgesses to come to parliament; which precept was to be returned to the sheriff by indenture between them, declaring the election and the persons chosen; and the sheriff was to make a return thereof together with the writ. Every person acting contrary to this, or other acts for election of members, was to incur the penalty ordained by stat. 8 Hen. VI. and moreover pay to every person chosen, but not returned (or any other who would sue in his default), 100l. with costs, to be demanded in an action of debt, wherein no wager of law or essoin should be allowed. Mayors and bailiffs were in the like case to incur the penalty of 40l. and pay in like manner 40l. to the party injured, or those who sued. A sheriff not making due election in convenient time (that is, in full county, between the hours of eight and eleven in the forenoon), and not making a good and true return of such election of

(*a*) Ch. 15.

(*b*) Vid. ant. 255. 268.

knights, was to forfeit 100l. to the king and 100l. to the party suing: but these actions against the sheriff by the party grieved were to be instituted within three months after the parliament commenced; if not, the cause of action would lapse to another. At the end of this act there is a clause, requiring that the knights of shires should be notable knights of the county for which they were chosen, or otherwise such notable esquires, gentlemen (*a*) of the same county, as were able to become knights, and no man of the degree of a yeoman (*b*) or under. Thus stood the election and qualification of members of parliament at the close of this reign.

Next to those that relate to the parliament are to be considered such acts as were made for regulating certain classes of individuals, such as servants, labourers, persons exercising various trades, and other matters of a miscellaneous kind.

The policy which had been marked out by the statutes of labourers passed in the reign of Edw. III. (*c*) was still pursued: while many changes were made therein, as occasion required, the general course and order of it continued the same (*d*). Some immaterial alteration was also made in the statutes of livery and maintenance (*e*). While these provisions were framing for the government of the inferior orders of the people, the interest of trade was considered, and many statutes passed to prescribe rules and bounds to be observed by merchants and traders in their dealings (*f*). The numerous provisions made by parliament for the protection of the coin and bullion, were other instances of the great solicitude now felt for the advancement of commerce (*g*). The staple of *Calais* was kept up with great strictness (*h*).

(*a*) *Gentils hommes del nativite.* (*b*) *Vadlet.* (*c*) Vid. ant. vol. II. 388. (*d*) Stat. 6 Hen. VI. c. 3. stat. 23 Hen. VI. c. 13. (*e*) Stat. 8 Hen. VI. c. 4. (*f*) Stat. 2 Hen. VI. c. 7. (*g*) Stat. 1 Hen. VI. c. 1. 4. 6. stat. 2 Hen. VI. c. 6. 9. 12, 13, 14. stat. 8 Hen. VI. c. 24. stat. 27 Hen. VI. c. 3. (*h*) Stat. 2 Hen. VI. c. 4, 5.

Instead of any new statutes against purveyors, those already made were directed to be proclaimed in every county four times a year (*a*). Some acts relating to escheats, and other points arising in the management of the revenue accruing from tenures, are little worthy of notice (*b*).

There are two statutes relating to the jurisdiction of the council and chancery. Of the council and chancery.

In the thirty-first year (*c*) of the king a statute was passed to give effect to the process by which persons were brought before the council. This act is very particular in the terms of it; and as it throws some light upon the nature of that jurisdiction, it may be proper to state it minutely, leaving the reader to make that application of it which the former part of this History will naturally dictate. It says, that upon suggestions and complaints made as well to the king as to the lords of his council, against persons for *riots, oppressions, and grievous offence* by them done against the peace and laws, he used to give commandment by writs under his great seal, and by his letters of privy seal, to appear before him in his chancery, or before him and his council, to answer for the above offences. Because these writs had not met with regular obedience, it was now ordained, that where such writ or letter issued, commanding any one to appear before the king or *his council*, and the person refused to receive it, or withdrew himself, or did not appear, and such disobedience was duly certified to the council; then the chancellor should have power to direct writs of proclamation into the county where the party dwelt, or the next adjoining county, *and also* into London, commanding the sheriff, under the penalty of 200*l.* to make open proclamation in the shire-town, and in the city, three several days immediately after delivery of the writ, for the party to appear before the council, or the chancellor,

(*a*) Stat. 1 Hen. VI. c. 2. (*b*) Stat. 8 Hen. VI. c. 10. stat. 18 Hen. VI. c. 7. stat. 23 Hen. VI. c. 17. stat. 39 Hen. VI. c. 2. (*c*) Ch. 2.

within a month after the last day of proclamation; the writ to be returned into the chancery within seven days after the proclamation, under the same penalty.

If the party did not appear within the month, then he was to forfeit, if a lord, all offices, fees, annuities, and other possessions, that he, or any one to his use, had of the grant of the crown; and if upon the issuing of a second writ and proclamation he still made default, he was to forfeit his estate and name of lord, and place in parliament. If he had no grant from the crown, then he was to forfeit his name and estate of lord, and place in parliament, and also all his lands and tenements; but all the above forfeitures were only for life. If the party was a commoner, he was to be punished for disobedience to the first writ by fine, at the discretion of the two chief justices; but if he had no livelihood whereof to pay a fine, he was to be put out of the king's protection. There was the usual proviso in favour of persons under the disabilities of sickness, imprisonment, being out of the realm, and the like.

While the legislature by this statute gave new vigour and energy to the authority of the council, they did not forget the regard which should be paid to the courts of common law; for in the conclusion of it the statute declares, that no matter determinable by the law of the realm should be determined otherwise than by the course of the law in the king's courts.

The same jealousy as formerly (*a*) was entertained of the new jurisdiction exercised by the chancery. In the second year of the king we find a petition to parliament, praying that no man be bound to answer in the chancery for a matter determinable at common law, under the penalty of 20*l.* to be paid by the plaintiff suing there (*b*); the answer to which was, that the stat. 17 Ric. II. should be executed (*c*). It was upon the idea suggested by this petition that stat. 15 Hen. VI. c. 4. was passed, by which it is

(*a*) Vid. ant. 179. 229. (*b*) Cott. Abri. p. 566. 541. (*c*) Vid. ant. 181.

enacted, that no writ of *subpœna* should be granted till surety was found to satisfy the party grieved and vexed for his damage and expence, if the matter of the bill should not be made good.

The authority of other courts was affected by the interference of parliament. It was complained, that the steward and marshal held pleas of debt, detinue, and other personal actions between parties who were not of the king's household (*a*); and that when they were mentioned in the record to be of the household, they were not permitted to take their exception to such allegation. It was enacted by stat. 15 Hen. VI. c. 1. that in every surety thenceforward to be taken for a defendant, he should not be estopped by the record, to say that himself or the plaintiff was not of the king's house, as supposed by the record. By stat. 24 Hen. VI. c. 1. justices of *nisi prius* were empowered to give judgment in all cases of felony and treason, as well upon acquittal as conviction, and to award execution. By chap. 3. of the same act, the assises for Cumberland are directed to be held at Carlisle.

The following are the few alterations made in the course of proceeding in different actions. Statutes of pernors of profits. Some statutes were made in this reign to correct some of the inconveniences that followed from the late device of separating the legal from the equitable estate; the object of which was to make (*b*) the *pernor of the profits*, as he was called, liable to such demands and burthens as he would be subject to, if he was legally seised of the freehold. The first act of this kind is stat. 14 Hen. VI. c. 3. It had been held, that the stat. 4 Hen. VI. c. 7 (*c*), was confined to an assise of novel disseisin; but by this act it was declared, that the same remedy might be had in all manner of writs grounded upon novel disseisin. Again, because tenants for life, and for years, would let their estate to persons unknown to their lessors, but still con-

(*a*) Vid. ant. vol. II. 420.

(*b*) Vid. ant. 173.

(*c*) Vid. ant. 220.

tinued to occupy and take the profits to their own use, and commit waste, it was enacted by chap. 5. of the same act, that the reversioner might maintain a writ of waste against such pernors of the profits, as well after as before the grant.

An act was made to prevent plaintiffs in assise charging the sheriff as a disseisor, in order that the writ might be directed to the coroners: it was provided by stat. 11 Hen. VI. c. 2. that the tenant might aver that the sheriff was not a disseisor, nor tenant, but was named disseisor by collusion; and if it was so found, the writ was to be quashed, and the plaintiff amerced.

Attaints. Some helps were contrived for rendering the proceeding by attaint more expeditious and effectual. The delay of attaints was heavily complained of. It was said, that when the grand jury appeared in court, and were ready to pass, one of the tenants or defendants, or one of the petty jurors named in the writ, would plead false and feigned pleas not triable by the grand jury, so that the taking of the grand jury was delayed till such pleas were tried; and after such pleas had been tried for the plaintiffs, another of the jurors, tenants, or defendants, would plead another feigned plea, *puis darrein continuance*; the rest might do the same; and though all were found against them, they were subject, says the act, to *no pain*. In order therefore to prevent such studied delays, it was provided by stat. 11 Hen. VI. c. 4. that the plaintiffs in such attaints should recover their damages and costs against all such tenants, jurors, and defendants. When it is considered, that there could not be less than thirteen defendants in an attaint, and that each of these might have a several plea, it is easy to conjecture to what a number of obstacles it was liable. The last mentioned act being thought too general, it was ordained by stat. 15 Hen. VI. c. 5. that should any foreign plea be found against the defendant, there should be the same judgment

against him as if the grand jury had passed against him, without any prejudice to the co-defendants. The same statute provided likewise for the qualifications of jurors in attainments, as did also stat. 18 Hen. VI. c. 2.

In some cases of a particular kind, a special mode of redress was prescribed by several statutes. It had often happened, that women were stolen away, and till they had signed some obligation or engagement for payment of money, sometimes married by force, or kept under restraint. As a more expeditious remedy than the law hitherto had provided, it was ordained by stat. 31 Hen. VI. c. 9. that in all such cases the party bound might have a writ out of chancery, containing the matter of complaint, and commanding the sheriff to make *proclamation* in the next full county after receipt of the writ, for the person offending to appear at a certain day before the chancellor or the justices of assise for the county, or some other *notable person* to be assigned by the chancellor, who was to examine the parties; and if the obligations were found to be so made, they were to be declared void, as well as all process and execution thereon, whether the offender appeared at the day or not. There was a penalty of three hundred pounds upon sheriffs not executing the writ, half to the king, and half to the party suing the writ, to be recovered in an action of debt, in which action no protection, wager of law, or foreign plea, was to be allowed.

The writ of proclamation was applied in another instance by stat. 33 Hen. VI. c. 1. where servants availing themselves of the consternation prevailing in the family upon the death of their master, would violently and riotously take away the goods of the deceased: it was by that statute provided, that in such case the chancellor, by the advice of the chief justices and the chief baron, or two of them, should, upon the application of two executors at least, direct such writs as they thought proper to sheriffs, to make

proclamation in cities, boroughs, towns, or other places, two market-days, within the space of twelve days next after delivery of the same writs, to appear in the king's bench at a certain day, so as the last proclamation should be made within fifteen days before the day of appearance. If the writ was returned, and the party did not appear at the day, he was to be attainted of felony: if he appeared, he was to be committed to prison, till he answered to such actions as should be brought against him by the executors, either by bill or by writ, for the aforesaid riot, taking and spoiling, provided the action was brought without delay, and not in order to keep the offender maliciously in prison. This act, like the former, contains penalties for the neglect of those who were intrusted with the execution of it. Executors had before been provided with a new remedy for keeping together the effects of the deceased, by stat. 9 Hen. VI. c. 4. which gave them the writ of *idemtitate nominis* (a) in the same manner as the testator might before have had it.

The remaining statutes concerning the administration of justice relate either to process and proceeding in general, or to the methods of trial, and the duty incumbent on officers of courts. Some statutes of *jeofail* and amendment were passed. The first act of this sort, which was made in the time of Edward III. had been extended by an act of the last king (b), to amendments as well after judgment as before; but this statute, being temporary, had expired with that king's reign: it was therefore now afresh enacted by stat. 4 Hen. VI. c. 3. that the act of Edward III. should be in force in every record and process, as well after judgment given upon a verdict passed, as upon a matter in law pleaded; and moreover, that it should be perpetual: but it was not to extend to records and processes in *Wales*, nor to proceed-

(a) Vid. ant. vol. II. 374.

(b) Vid. ant. 258.

ings where process of outlawry lay. After reviving the statute of Henry V. and that of Edward III. the legislature made further provision on the subject of amendments. It was enacted by stat. 8 Hen. VI. c. 12. that for error assigned in any record, process, or warrant of attorney, original or judicial writ, pannel, or return in any places of the same rased or interlined, or in any addition, subtraction or diminution of words, letters, titles, or parcel of letters found therein, no judgment should be reversed, or record annulled; but that the judges of the court should have power, with their clerks, to examine the same, and reform and amend (in affirmance of the judgment of such records and processes) all that which to them, in their discretion, seemed to be misprision of the clerks, so that no judgment should be reversed, or record annulled, by reason of such misprision. Out of this act are excepted all appeals and indictments of treason and felony, and outlawries for the same; nor was it to extend to cases where the substance of the proper names, surnames, or additions were left out in original writs or writs of exigent, according to stat. 1 Hen. V. c. 5. or in other writs containing proclamations.

Some further regulations were made by this act respecting records. If any record, process, writ, warrant of attorney, return, or pannel, was certified defectively, it might now, upon the challenge of the party, be reformed, and amended according to the original; and if such original being in any of the four courts at Westminster, or in the treasury of such courts, was stolen by any clerk or other person, by reason whereof any judgment should be reversed, he and his aiders were to be considered as felons. This fact was to be tried by the judges of the two benches, and a jury, half of which was to consist of men belonging to the courts. Again, it was provided by ch. 15. of the same statute, that the king's justices should amend all misprisions or defaults in records or processes, or in the re-

turns of the same, made by sheriffs, coroners, bailiffs of franchises, or others, by misprisions of clerks of the court, the sheriffs, or their clerks and other ministers, in writing one syllable too much or too little. Thus did the statute follow almost the words of the statute of Edward III. with the same exception of records and process in Wales, and those of outlawry in felony and treason.

Juries. Some laws were made for the better ordering of juries. Because, in *special* assises, the parties were not furnished with pannels of the jurors before (a) the day of the sessions, and therefore had not time to see that they were all duly qualified, it was enacted by stat. 6 Hen. VI. c. 2. that the pannels should be arrayed, and an indented copy thereof delivered by the sheriff to the parties (if they demanded it) six days at least before the sessions of the justices. The jury *de medietate*, which had been granted by stat. 28 Ed. III. c. 13. (b) was thought to be repealed by stat. 2 Hen. V. st. 2. c. 3. which requires jurors to be freeholders; a qualification that could not possibly be enjoyed by aliens. To repel this inconvenient construction, it was enacted by stat. 8 Hen. VI. c. 29. that those qualifications should extend only to inquests to be taken between denizen and denizen. Because the sheriff or his officers were often bribed to return favourable juries, an action was given by stat. 18 Hen. VI. c. 14. to recover ten times the money given for such purposes; and, what is remarkable, the statute authorizes the justices to enquire of the truth, *as well by examination of the defendant* in such suit for the penalty, as by an inquest. But this was only a temporary act, and expired with the then parliament. Another temporary act directed (c), that all foreign pleas, pleaded after the return of the *venire*, should be tried where the writ was brought. Some other statutes upon the same subject were made at

(a) Vid. ant. vol. II. 428.

(b) Vid. ant. vol. II. 461.

(c) Stat. 23 Hen. VI. c. 12.

different times in this reign, but, being of short continuance, were soon forgotten (a).

It seems, that the officers of the court would sometimes make the entry of *obtulit se in propria personâ*, when in truth the plaintiff had never appeared; but it was ordained by stat. 10 Hen. VI. c. 4. that no filazer, exigenter, or other officer, should make such entry, unless the plaintiff appeared in proper person before some of the justices where the plea was depending, and was there sworn upon a book, that he was the same person. The act permits that his counsel, or some other person, might make the oath for him. Again, because in many outlawries the entry was, that the parties appeared by their attorney, where, in truth, the attornies had no warrant of record; on which account the outlawries used to be reversed; it was enacted, that every attorney, who had not his warrant entered of record in all suits wherein process of *capias* and *exigent* were awardable, the same term in which the *capias* was awarded, or before, should be fined forty shillings by the justices.

It was endeavoured to put the office of sheriff, and other ministers of justice, upon a footing which would render the execution of them ^{Sheriffs, and execution of process.} more regular, effectual, and incorrupt. Two acts had been made in the reign of Ed. III. (b) ordaining, that no sheriff should stay in office more than a year: again, by stat. 1 Ric. II. c. 11. no one who had served, was to be chosen again within three years. Notwithstanding these acts, it seems that sheriffs used to be continued ten or twelve years in their office, which led to great abuses in the administration of it. To prevent these, it was now again enacted by stat. 23 Hen. VI. c. 8. that the former statute should, in future, be duly observed; with an exception of the under-

(a) Stat. 4 Hen. VI. c. 1. 2. stat. 8 Hen. VI. c. 13. stat. 11 Hen. VI. c. 7. stat. 20 Hen. VI. c. 2. stat. 33. Hen. VI. c. 7.

(b) Vid. ant. vol. II. 403, 404.

sheriffs, and all other officers in the city of London; of such counties where several persons were inheritable to the office, and had a freehold therein; as also with an exception of letters patent made of the office, and the under-sheriffs and clerks of such patentees. And it was further ordained, that if any sheriff, under-sheriff, or sheriff's clerk, occupied his office in violation of the above acts (with the above exception), he should forfeit 200*l.* yearly, half to the king and half to the person suing, as long as he continued therein. All pardons of this offence, and all patents granting the office for years, for life, or in fee, contrary to this act, are declared void, notwithstanding any clause of *non obstante*; and the persons accepting such patents are declared for ever disabled to hold the office.

This act was succeeded by another in the same year (*a*), containing several regulations for their government in discharging their office, and that of others in the like employment, as under-sheriffs and their clerks, coroners, stewards of franchises, bailiffs, and keepers of prisons. It was enacted, in order to avoid *perjury, extortion, and oppression*, that no sheriff should in any manner let to ferm his county, or any of his bailiwicks, hundreds, or wapentakes, as had been (*b*) before forbid by several acts; nor should any sheriff, under-sheriff, bailiff of franchises, or other bailiff, return upon an inquest any bailiffs, officers, or servants of any of the before-mentioned officers; and that none of them should, by occasion or colour of his office, take any thing by himself or by others to his use, profit; or avail, from any person by them to be arrested or attached, for omitting an arrest or attachment, or for shewing ease or favour, except only the fee of twenty pence to the sheriff, and four pence each to the bailiff and the gaoler, if he was committed to ward. Nor were they to take for the making of any return, or pannel, and the copy of a pannel, more than four pence.

(*a*) Ch. 10.

(*b*) Vid. ant. vol. II. 402.

After these restrictions as to fees, there follows the famous clause concerning letting to bail upon arrests, which is worded in the following way: That sheriffs, and all other officers and ministers above mentioned, should let out of prison all manner of persons arrested by them, or being in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon *reasonable sureties of sufficient persons, having sufficient within the counties* where such persons were let to bail or mainprise, to keep their days in such places, as the said writs, bills, or warrants, required; with an exception of the following persons; namely, those in ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, those committed by special commandment of any justice, and vagabonds refusing to serve according to the statute of labourers. Nor was the sheriff, or officers before-mentioned, to take an obligation for the above causes, or by colour of their office, but only to themselves, and by the name of their office, and upon condition written, that the prisoner should appear at the day and place contained in the writ, bill, or warrant; and all other obligations taken by colour of their office were declared void: four-pence was the utmost he was to take for making such obligation, warrant, or precept. It was further ordained, that all sheriffs should yearly appoint a deputy in the court of chancery, king's bench, common-pleas, and exchequer, to receive all writs and warrants to be delivered to them; and this was to be done before they returned any writs. Any of the above officers breaking this act, were to forfeit to the party grieved treble damages; and, moreover, 40l. half to the king and half to the party grieved. Charge of this act was given not only to the justices of assise, and of the two benches, but also to justices of the peace, who were empowered to hear and determine *ex officio*, without special commission, all breaches thereof. As a caution in favour of the old course, which otherwise

might be thought to be waived by the above clause about bailing, it was added, that sheriffs who made a return of *cepi corpus*, or *reddidit se*, should still be chargeable to have the body at the day of return, as before the making of the act. The warden of the *Fleet* and of the king's palace at Westminster were excepted out of this act.

An act was made in the early part of this reign (a), requiring, that all officers appointed by the king's letters patent, within his courts, and who had power to nominate clerks and ministers, should be sworn to appoint such persons as they would answer for, and who would regularly attend their duty there. These were the measures now pursued for securing the chaste administration of justice, instead of increasing the number of statutes passed in the reign of Edward I. against maintenance and champerty, and extortion, so much practised at that time by the officers of courts (b).

There is an act relating to attornies, which deserves some notice for the singularity of the facts it contains. This is stat. 33 Hen. VI. c. 7. which says, that not long since in the city of Norwich, and in the counties of Norfolk and Suffolk, there were only *six* or *eight* attornies at most, coming to the king's courts, in which time great tranquillity reigned in those places, and little vexation was occasioned by untrue and foreign suits. But now, says the act, there are in those places *fourscore* attornies, or more, the generality of whom have nothing to live upon but their practice, and besides are very ignorant. It complains, that they came to markets and fairs, and other places, where there were assemblies of people, exhorting, procuring, and moving persons to attempt untrue and foreign suits for small trespasses, little offences, and small sums of money, which might be determined in courts-baron; so that more suits were now raised for malice than for the ends of justice,

(a) Stat. 2 Hen. VI. c. 10.

(b) Vid. ant. vol. II. 240.]

and courts-baron became less frequented. These are the motives the act states for making a reformation; which was, that in future there should be but *six* common attornies in the county of Norfolk, the same number in Suffolk, and in the city of Norwich only *two*: these were to be admitted by the two chief justices, of the most sufficient and best instructed; and persons acting as attornies in those parts without such admission, were subjected to heavy penalties.

The first statute that anywise affected the criminal law in this reign is stat. 2 Hen. VI. c. 17. which made it treason for any to escape out of prison if he was indicted, appealed, or taken on suspicion of high treason. The penalty of treason was inflicted on other offenders of different kinds. Because letters had been sent to persons demanding money to be put in certain ^{Treason to} burn houses, places, with threats to burn their houses if they did not comply, it was enacted by stat. 9 Hen. VI. c. 6. that all such burnings should be judged high-treason. However, that the landholders might not be prejudiced by such an extension of the stat. 25 Edw. III. it was declared that the forfeitures should be saved to lords, as in cases of felony: the like exception was inserted in stat. 20 Hen. VI. c. 3. which made it high-treason for any inhabitant of Wales or the Marches to carry away cattle out of the English counties. This plundering had occasioned an act in the reign of Henry IV. (a), among other regulations for restraining the outrages of the Welch. Again, by stat. 23 Hen. VI. c. 3. the sheriff of Herefordshire was enjoined under penalties to take all offenders coming out of Wales to market, and to levy hue and cry after them. The above stat. 20 Hen. VI. being left to expire after it had been continued by an act in the last parliament (b), the like provision was again enacted by 28 Hen. VI. c. 4. which likewise extended it to the people of Lancashire and other parts; for

(a) Vid. ant. 241.

(b) Stat. 27 Hen. VI. c. 4.

if any one took any goods, chattel, or *person* out of the counties and seignories royal in Wales and the duchy of Lancaster, and carried them to any other places, it was adjudged felony.

Other felonies were enacted by statute. It appears, that masons used to hold confederacies and meetings, to concert schemes for opposing the statutes of labourers. To prevent the effects of these, it was enacted by stat. 3 Hen. VI. c. 1. that any one causing such *chapters or congregations* to be assembled, should be adjudged guilty of felony. Among other penal laws for the regulation of trade, it was by stat. 11 Hen. VI. c. 14. made felony to carry any goods and merchandise of the staple into creeks, as was often done to avoid the customs: this was a temporary act, which expired in three years. Again, it was by stat. 18 Hen. VI. c. 15. made felony to carry wools or woolfels to other places than the staple at *Calais*. Trade and commerce had now become very important objects in the contemplation of the legislature, and many other acts of a penal nature were made for the protection of them.

Process in criminal causes. The alterations made in criminal proceedings are of more consequence to the historical lawyer: these relate principally to process, to indictments, and to jurors. A law was made for the government of process in the king's bench, where, as it is represented by the statute, it was common to get a person indicted "by suspect jurors, hired and procured to the same" "by confederacy and covin of the said conspirators;" upon which a *capias* used to be awarded to the sheriff of the county where the bench was, returnable within two or four days; when, if the party came not, an *exigent* would be awarded, and so the goods of the party became forfeit. It was now enacted by stat. 6 Hen. VI. c. 1. that before any *exigent* was awarded in such case, a writ of *capias* should be directed as well to the sheriff of the county where the party was indicted, as of the county whereof he

was named in the indictment; and this *capias* was to have the space of six weeks or longer, at the discretion of the justices, before the return; and any exigent awarded or outlawry pronounced before such return, was declared to be null and void. This act was confined to cases, where the defendant lived in the same county in which the king's bench then was. The commons had petitioned in the preceding reign, that where a defendant indicted in the king's bench lived out of the county, there might be three *capias*'s, with fifteen days between each, before the exigent was awarded (a).

The preferring of indictments and appeals in foreign counties, and within liberties and franchises, was practised as a mode of oppression against defendants, who might in this way be put in *exigent* by surprise, before they knew of any indictment against them. To remedy this, it was provided by stat. 8 Hen. VI. c. 10. that before any *exigent* should be awarded, a second *capias* should issue presently after the first, into the county whereof the defendant was named in the indictment, returnable on a certain day, containing the space of three months from the date of the last writ to the return, where the counties were held from month to month; and where they were held from six weeks to six weeks, containing the space of four months. The second *capias* was to command the sheriff to take the party, if he was to be found, and if not, then to make proclamation, in two counties before the return, for him to appear at the day contained in the writ; and if he came not, then the exigent was to be awarded; and all exigents issued or outlawries pronounced in any other manner, were to be void. This act relates to all cases, whether treason, felony, or trespass. It was further provided, that wherever a person was indicted, or appealed in the manner aforesaid, and was duly acquitted by verdict, he should have a writ and *action upon his case*, against every procurer of such indictment or appeal, and like pro-

(a) Cott. Abri. p. 547. § 37.

cess as in a writ of trespass *vi et armis*; and if the procurer was attainted, he should recover treble damages. The process against persons living in the same county in cases of treason, or felony, was to continue as formerly.

Because the above statute was thought to have no force but where the *capias* was returnable before the justices or commissioners who had taken the indictment, it used to be evaded by removing the indictment into the king's bench or elsewhere by *certiorari*, and then issuing the common-law process; to prevent which, and in explanation of that act, it was declared by stat. 10 Hen. VI. c. 6. that in such case the same process should be had as in the former case, otherwise the exigent and outlawry should be void.

The stat. 2 Hen. V. st. 1. c. 9(a). was revived by stat. 8 Hen. VI. c. 14. with this alteration, that before the *capias* was awarded, it should be testified by two justices of the peace, that a common fame and rumour ran of such riots; and when the fact was in the county palatine of Lancaster, or other franchise where there was a chancellor and a seal, after complaint so testified by a justice or sheriff, the chancellor was to award a proclamation and writ, as the chancellor of England might by the former act.

It had been ordained by stat. 20 Hen. VI. c. 2. that persons attainted in the county of Lancaster should forfeit only such goods as they had within the county; but it being observed that offences were more common within that county than elsewhere, which was attributed to this circumstance concerning forfeiture, that act was repealed by stat. 33 Hen. VI. c. 2.: however, to check the abuse of hasty indictments in a local jurisdiction, it was by the same act required, that the jurors who found indictments should have certain qualifications in land, or the indictment should be void.

A passage in the famous 29th chapter of *Magna Charta* was explained by stat. 20 Hen. VI. c. 9. It was there said, that no mention was made in that chapter how

(a) Vid. ant. 253.

ladies of great estate, such as duchesses, countesses; or baronesses, were to be put to answer, or before what judges they should be judged on indictments of treason or felony: it was now ordained, that they should in such cases, whether married or sole, be tried as *peers* of the realm.

The summary proceeding in case of *forcible* Forcible entries, *entries*, which had been appointed by stat. 15

Ric. II. c. 2. (a), was enlarged and rendered more effectual by stat. 8 Hen. VI. c. 9. The defects of the former act were, that it did not include a detainer with force, after a peaceable entry, nor cases where the persons entering forcibly were removed before the coming of the justices: again, there was no penalty on the sheriff, if he neglected to obey the precept of the justices. Owing to these defects, many wrongful and forcible entries were daily made, followed with gifts, feoffments, and discontinuances, sometimes to lords and great persons for maintenance, and sometimes to persons unknown. To comprehend all these mischiefs, it was provided generally, that where any one made forcible entry into lands, tenements, or other possessions, and held them forcibly, after complaint to the justices, they should cause the said statute to be executed; and whether such offenders were present, or departed before their coming, yet the justices, or justice, in some good town next to the tenements, or in some other convenient place, should inquire of the matter by the people of the county, and upon their verdict put the party in possession. If the party making the entry had made a feoffment, or discontinuance, to any lord, or other person, to disappoint the possessor of his recovery; and such conveyances were found in an assise, or other action to be made for maintenance, they were declared void. In order to make the above inquiry, the justices were to issue precepts to the sheriff, to cause to come before them suffi-

(a) Vid. ant. 202.

cient and indifferent persons dwelling next about the places, having lands of the yearly value of forty shillings above reprises, under pain of 20*l.* penalty. It was enacted, that the party disseised might, in all the above cases, have an assise or writ of trespass, and recover treble damages, and a fine should be paid to the king. This act was not to extend to persons who kept forcible possession, if they, or their ancestors, or they whose estate they enjoyed, had been in possession for three years.

Justices of the peace. The authority of justices of the peace was still increasing, by the number of articles of small concern which were submitted to their direction and superintendence. Many of these have been already mentioned. The following acts were made to govern them in the exercise of their jurisdiction. We have seen, that by stat. 2 Hen. V. c. 4. the justices were to hold their sessions four times a year: it was now stated in stat. 14 Hen. VI. c. 4. that, considering the high courts of justice were held in the county of Middlesex in the four terms, at which time the commons were to attend to inquire of such articles as were inquirable there; and that the justices held their sessions immediately after the term, more to avoid the penalty of the statute than for any business they had to transact; and that bringing the people together again on that occasion was harassing them both in term and out: under all these considerations it was enacted, that the justices of Middlesex should be discharged of the penalty while the court of king's bench sat in that county, provided they sat twice a-year at least, and oftener if need were.

It is complained in stat. 18 Hen. VI. c. 11. that notwithstanding the laws made for ascertaining the qualifications of justices, yet many were of small fortunes, and necessitous, so as to become contemptible, as well as guilty of great extortions: wherefore it was now provided, that none should be assigned who had not lands or tenements to

the value of 20*l.* by the year: a person assigned who had less than that, was to give notice thereof to the chancellor within a month; and if he did not so do, or made any warrant or precept, he incurred the penalty of 20*l.* and was to be put out of the commission. However, if there were not sufficient persons having lands and tenements of the above value, who were learned in the law and of good governance, the chancellor had a discretion to put in others. Again, all cities and places were excepted out of this act, if they had justices of the peace living therein, by commission or warrant from the king. Thus far of the statutes made in the long, but turbulent and unfortunate, reign of Henry VI.

In the reign of Edward IV. the parliament ^{Statutes of Edward IV.} seem to be principally taken up with the arrangement of the commercial system. Many statutes were made for the regulation of import or export, and for the management of trade and manufactures at home. Among these may be ranked some sumptuary laws, which limited the expense and fashion of dress to be worn by different degrees of persons (*a*). Very few alterations were made in the law of property, or the administration of justice.

In one instance, a revolution was effected in an ancient branch of our judicial establishment, which from thence began to go almost wholly out of use. This was by stat. 1 Ed. IV. c. 2. which took away from the tourn ^{The jurisdiction of the tourn restrained.} the power of hearing and determining, and transferred it to the quarter sessions. The tourn was the great criminal court of the Saxons (*b*), which had given place in some degree to the justices of gaol-delivery, and of oyer and terminer, after the Norman policy began more generally to prevail. Since justices of the peace had been invested with so much authority, this

(*a*) Stat. 3 Ed. IV. c. 5. stat. 22 Ed. IV. c. 1. (*b*) Vid. ant. vol. I. 6.

court had been still less resorted to. This want of employment induced the persons interested in the support of these courts to try unfair means to supply the loss of their profits.

This appears from the preamble of the act; which states the reason for the change it was going to make, in the following words: "Because, by the inordinate and infinite indictments and presentments, as well of felony, trespass, and offences, as of other things, which had of long time been taken before sheriffs in their counties, under-sheriffs, their clerks, bailiffs, and ministers, at their tourns or law-days; which indictments and presentments were oftentimes affirmed by jurors having no conscience, nor any freehold, and little goods; and often by the said sheriffs' menial servants and bailiffs, and their under-sheriffs; by which indictments people were attached and arrested, and put in prison, and constrained to make grievous fine and ransom; after which they would be enlarged^(a), and the indictments embezzled and withdrawn:" the act therefore ordains in future, that the above persons should not have power to arrest any one, or levy fines by colour of indictments so taken; but they should deliver all such indictments to the justices of the peace at their next sessions of the peace, under the penalty of forty pounds. The justices were to award process thereon, the same as if the indictment was taken before them; and to arraign, and deliver or fine the defendants. The estreat of such fines was to be delivered to the sheriff, who was to forfeit one hundred pounds, if he arrested, put in prison, or levied any fine before he had process from the justices. This act did not extend to the sheriffs of London, nor to any indictment taken within that city. Thus did the quarter sessions rise in consequence upon the destruction of the tourn.

(a) Vid. ant. vol. II. 459, 460.

The administration of civil justice in one particular instance was regulated by stat. 17 Ed. IV. c. 2. relating to the court of *Piepowder*. This court was for the determination of questions arising upon contracts in fairs, and was generally held by the steward of the manor where the fair was kept. The dispatch with which matters were decided in this court, as well as other reasons, tempted many to bring suits here, that belonged properly to the common law: to prevent this, it was now ordained, that in such causes the plaintiff or his attorney should swear, that the matter arose within the bounds and jurisdiction of the fair; which point might be contested by the defendant.

The statute of Henry VI. and the former acts, which confined sheriffs under great penalties to the exercise of (a) their office for a single year, had been disregarded during the first three or four years of this reign. As this was attributed to the unsettled state of things, which made it convenient to avoid a change, an act was passed (b) for indemnifying such sheriffs against the penalties. Again, sheriffs were indemnified against the penalty for returning writs after the 6th of November, if they had not received a writ of discharge (c): for the appointment of new sheriffs being on the morrow of *All Souls*, they did not receive their patents, nor qualify themselves, till long after Michaelmas term; owing to which, there was, before this act, a chasm during that interval in the office of sheriff. The provisions of this act were enacted more generally in another statute (d), which gives the old sheriffs authority to do every act belonging to the office during Michaelmas and Hilary terms, unless they were lawfully discharged.

The playing at certain games was forbid by stat. 17 Ed. IV. c. 4 (e), and those who suffered them to be used in their houses or other places, were to be imprisoned for three years, and forfeit twenty pounds. In consideration of the fre-

(a) Vid. ant. 281. (b) Stat. 8 Ed. IV. c. 4. (c) Stat. 12 Ed. IV. c. 1.

(d) Stat. 22 Ed. IV. c. 6.

(e) Vid. ant. 171.

quent trouble that freeholders were put to in the county of Middlesex more than in any other county, as they were called upon to attend on juries in the four courts at Westminster, besides the quarter sessions, and the like; and because upon the *venire*, or *habeas corpora*, an *essoyn* might be cast by the plaintiff, or defendant, and then *all* the jurors would be put in default; it was ordained, that in such case the jurors should be demanded at the fourth day of the return, and the appearance of such as were present be recorded (a).

(a) Stat. 8 Ed. IV. c. 3.

CHAP. XXI.

HENRY VI. EDWARD IV.

Tenures—Knight's Service—Escuage—Socage—Serjeanty—Homage—Fealty—Villinage—Of Copyholds—Of Rents—Estates Tail—Perpetuities declared void—Recoveries to bar Entails—Taltarum's Case—Of Dower—Tenant at Will—Estates upon Condition—Mortgages—Of Parceners—Jointenants—Tenants in Common—Attornment—Feigned Recoveries—Of Uses—Their Nature and Properties—An Executory Devise—Of Chattels—Of Contracts.

THE decisions of courts during these reigns present many interesting points of historical investigation. Among other subjects of improvement, we see the birth of that system of equity which is administered by the court of chancery; we find the doctrine of uses, and the application of a common recovery to the barring of estates tail, fully established. These were topics unknown to our old law. In the meantime, the learning of real actions gradually gave way, personal writs became more frequent, and pleading grew into a science of much nicety and refinement: in short, the whole face of the law seems to be assuming that character which it has retained to this present day. So large a field is here opened, that should we only go into such passages of this period as seem properly to belong to the juridical historian, we might, perhaps, engage further than every reader would be disposed to follow: we shall therefore content ourselves with selecting certain heads of inquiry that stand more eminently distinguished from the many

others which are furnished by the valuable reports of these times.

Tenures. In the times of Glanville and Bracton, when tenures were in all their vigour, we gave an account of their different kinds from the works of those two writers. Since those days, great revolutions had happened in this sort of property, which, however, did not so much alter the law, as obscure the evidence by which distinct tenures were to be known. Thus, *knight's service* and *socage* were still the principal species of tenure; but as the *servitium militare* was performed by very few, and that rarely (this service having given way to the employment of hired troops), and as the *servitium sokæ* was now no where known, but was universally commuted for certain rents and other compensations, it was necessary to recur to other evidences of these two tenures, in order to pronounce which was *knight-service*, and which was *socage*; or, in other words, which was and which was not to be burthened with ward, marriage, relief, and other casualties; those being the grand points which interested both lord and tenant.

In order therefore to ascertain this, many circumstances were to be considered; such as whether the tenant did homage or fealty; whether he rendered services that were certain or uncertain, and the like: and from a comparison of these properties and incidents, the conclusion was to be drawn, whether the land in question was held by *knight's service*, or in *socage*; for under one of those it must be ranked, whether it was *escuage*, *grand* or *petit serjeanty*, *burgage*, or any other special denomination, which was merely descriptive of certain modifications of those two principal holdings. Our curiosity is naturally led to inquire into the alterations that had taken place in so important a part of the law of real property as tenures, since those early periods when this subject was canvassed so much at length. Some statutes had been made at different times

to correct the inconveniences arising from tenures, and some small variation had been effected by the resolutions of courts; but upon the whole, the leading ideas still maintained their ground.

For example, in *knight's service*, it was still the law, that when the tenant died, leaving an heir male under 21 years, the lord should have the land till he arrived at such age; and if he was not married, the lord was also to have the marriage. But if it was an heir female, and she was of the age of 14 or more, the lord had neither the land, nor body in ward; because she might marry one who was sufficient to do the service. If she was under 14 years, and unmarried, then he might have the wardship of the land till she was 16 years old; concerning which point some provisions had been made by the stat. Westm. 1. and the stat. Merton, and which are mentioned in their proper places (a). By these parliamentary provisions was the law of ward and marriage governed at the time of which we are now writing. As to relief, the law was, that where the tenant held by a whole knight's fee, the relief should be 100 shillings, and so in proportion (b).

The *servitium militare* had become so generally commuted for the *servitium scuti*, or *scutagium*, as mentioned by Bracton (c), that *escuage* was in these days considered almost as a substitute and convertible term for *knight's service*; so that Littleton, in order to clear the subject, felt himself under the necessity of declaring expressly, "that many tenants held by *knight service*, who yet did not hold by *escuage* (d)." It is for this reason that the same writer, in his *Book of Tenures*, begins with *escuage* as the chief and most general holding in the kingdom, and then goes on to *knight's service*, *socage*, *serjeanty*, and the others. We have seen, in the time of

(a) Vid. ant. vol. I. 260. and vol. II. Litt. 103.
Vid. ant. vol. I. 235.

(c) Vid. ant. vol. I. 274.

(b) Litt. 112.

(d) Litt. 111.

Bracton, that this *servitium scuti*, or *scutagium*, was called sometimes *servitium regale*, because it was to be performed to the king, and *servitium forinsecum*, because it was not performed to the lord, but was done *foris*, and without the lord's jurisdiction. The account of the tenure by *escuage*, as given by Littleton, corresponds with all these terms. The instance he gives is, when the king made a voyage royal into Scotland; and then those who held by *escuage*, were to be assessed according to the number of their knights fees (a).

Though *escuage* was due by tenure, yet because it concerned almost the whole kingdom, it could not be assessed but by authority of parliament; and it is said that *escuage* had not been assessed since the eighth year of Edward II. When Richard II. made a voyage royal into Scotland, the payment of *escuage* was remitted at the petition of the commons (b). When *escuage* was so assessed by parliament, every lord used to receive the sum assessed on his tenants (c), and those who held of the crown paid their *escuage* to the king. After such parliamentary assessment, a lord might have a writ to the sheriff of the county, to levy the sum due (d), or he might distrain; but to such distress the tenant might plead, that he was with the king for 40 days in his voyage royal; and the issue would be tried by the certificate of the marshal of the king's host, in writing under seal. So obsolete had this personal service become in the reign of Edward IV. that the author before quoted speaks of this method of proof as depending on a traditionary opinion, which had not been confirmed by any recent experience (e). Such was the form in which tenure by *knight-service* now mostly shewed itself.

The idea of socage-tenure was now confined
 Socage. to this definition; namely, where a tenant held by *certain* service for all manner of services, provided such

(a) Litt. 97.

(b) 1 Inst. 72. b.

(c) Litt. 100.

(d) Ibid. 101.

(e) Ibid. 102.

service was not *knight-service*; as, where a man held his land by fealty and certain rent, for all manner of services; or held by homage, fealty, and certain rent, for all manner of services (*a*); or if a person held by fealty only: in short, every tenure which was not a tenure in chivalry, was tenure in socage (*b*). And the principal difference between these two tenures was, whether the service was *certain* or *uncertain*; the latter being the grand criterion that distinguished knight's service, and the former socage-tenure: for even escuage, if it was a certain sum, was considered as a socage-tenure. Thus, if a man was to pay half a mark for escuage, whenever that assessment was made by parliament, whether at a greater or less sum, this was socage, on account of the sum being certain and unalterable; but where the escuage was *uncertain*, notwithstanding it might have been lowered by agreement to one half or one quarter of the parliamentary taxation, yet such a holding was still by an *uncertain* escuage, and so was deemed knight-service (*c*). Again, if a certain rent was to be paid for castle-guard, it was socage-tenure; but if the tenant ought to do castle-guard in person, or by another, it was knight-service (*d*).

We have seen how the law stood in the time of Glanville and Bracton, concerning the wardship of socage-tenants (*e*). What had been delivered by those authors is, for the most part, now confirmed by our great oracle on the law of tenures in later times. If a tenant in socage, says Littleton, died, leaving issue within the age of 14 years, then the *prochein amy*, or next friend to the heir, who could not inherit the land, was to have the wardship of the land and the heir, till his age of 14 years, under the title of *guardian in socage*. Thus, if the inheritance came *ex parte maternâ*, the guardian was to be the next cousin on the part of the father, and so *vice versâ*, according as

(a) Litt. 117.

(b) Ibid. 118.

(c) Ibid. 120.

(d) Ibid. 121.

(e) Vid. ant. vol. I. 286. 288.

it had been laid down by Glanville and Bracton. When such heir arrived to the age of 14 years complete, he might enter and oust the guardian, and occupy the land himself. The guardian was not to take the profits of the inheritance to his own use, but was to render an account thereof to the heir, with an allowance of all reasonable costs and charges; and if such guardian married the heir within the age of fourteen years, he was to account for the value of the marriage, although he took nothing for the value; for the law expected he should, and *it was his own folly*, says Littleton, if he did not; but he would be excused, if he had procured him a match of as much value as the marriage of the heir (*a*). A stranger who occupied the inheritance as guardian, would be equally liable to account; for he would not be permitted to plead he was not next friend, but must answer, whether he had occupied the land or not. If the guardian continued to occupy till the heir was twenty-one years of age, it was a doubt whether the heir should have account against him as guardian or as bailiff (*b*).

There was this difference between a guardian in chivalry and in socage, that if the former died during the minority of the heir, his executor had the wardship; but it was not so of a guardian in socage who died before the heir had attained his 14th year; for then it went to another *prochein amy*, to whom the inheritance could not descend: this difference was owing to the former guardian's taking the profits to his own use, and the latter not. It was held, that no writ of account lay against the executors of a guardian in socage, unless it was for the king (*c*). The relief in socage-tenure was a year's rent (*d*); and because the lord had no wardship in this tenure, he had relief in all cases, whatsoever might be the age of the heir; and he might distrain for it forthwith upon the death of the te-

(*a*) Litt. 123.

(*b*) Ibid. 124.

(*c*) Ibid. 125.

(*d*) Ibid. 126.

nant (*a*). Indeed, if the rent happened to consist in paying a rose, or some other production of the earth, he must wait till the season would furnish it (*b*).

The title to ward, like most other considerations arising upon landed property, was perplexed with the modifications that estates had been made subject to in the present mode of conveyance. However plain the law might be when the lord and tenant held in fee-simple, it was a matter of some nicety to decide what tenant should be in ward, where there were reversions and remainders. The courts had long laid down some rules upon this head, and many points of this sort were agitated during the present period.

It had long been held, that where land was leased for life, with a remainder over in fee, and the remainder-man died during the life of the particular tenant, leaving a son under age, the lord should not have the son in ward; but whenever the tenant for life died, and the son entered, he was to be in ward, because he was in as heir to his father. But where a lease was made for life, reserving the reversion to the lessor, the lord would in such case have the ward and marriage (*c*). The same if a gift was made in tail with a reversion; for the donee was considered as holding of the reversioner, and the issue was to be in ward to him; the reversioner continuing to hold of the lord paramount (*d*): whereas in case of a remainder, the tenant for life, or in tail in possession, was the very tenant to the lord paramount. The title to wardship was frequently involved in difficulties from the following considerations: from the king's prerogative, where a tenant held one fee of the king, and others of common persons; from a feoffment made by collusion to avoid the wardship of the heir; from claims depending on priority and posteriority; and either of these, when mixed with questions of estates, with discontinuances, disseisins, and remitter, tended very much to perplex the law respecting rights of wardship (*e*).

(*a*) Litt. 127.

(*b*) Ibid. 129.

(*c*) O. N. B. 96.

(*d*) 2 Ed. IV. 5. (*e*) 33 Hen. VI. 55. 33 Hen. VI. 14. 15 Ed. IV. 10.

Having considered the nature of socage in general, we shall make some few observations upon the several species of it. Successive determinations had contributed to make some alteration in the notion of tenure by *serjeanty*, which is now described as differing somewhat from the same tenure in the time of Bracton (*a*). It was now laid down, that *grand serjeanty* must be a holding of the
 Serjeanty. king, and of him only, by such services as ought to be done in proper person to the king; as to carry the king's banner or lance; to lead his army, to be his marshal, carry his sword before him at the coronation; to be his carver, his butler, one of his chamberlains of the receipt of the exchequer, or other service (*b*): to find a man for the war (*c*) was also a grand serjeanty. The same service made the tenure different, accordingly as the land was held of a private person, or of the king. Thus land held by the service of cornage, to wind a horn when the Scots came into the country, was grand serjeanty, if held of the king; yet if held of a private person, it was not grand serjeanty, but knight-service, and drew to it ward and marriage; for none could hold by grand serjeanty but of the king only (*d*). Grand serjeanty again differed from escuage, inasmuch as those who held by escuage ought to do their service out of the realm; but those who held by grand serjeanty were to perform their service within the realm, as appears by most of the above instances (*e*). One who held by grand serjeanty, was considered as a tenant by knight-service; for he was liable to ward, marriage, and relief; but no escuage could be demanded of him, unless it was also a tenure in escuage (*f*).

Tenure by *petit serjeanty* was now, like the former, always a holding of the king, and him only; to yield to him a bow, a sword, dagger, knife, lance, a pair of gloves, an arrow, or other small things belonging to war. This

(*a*) Vid. ant. vol. I. 273.

(*b*) Litt. 153.

(*c*) Ibid. 157.

(*d*) Litt. 156.

(*e*) Ibid. 155.

(*f*) Ibid. 158.

service was considered in effect but as socage; for the tenant was not obliged to go, or do any thing in person touching the war, but merely to pay yearly certain things to the king (a). Such were the natures of grand and petit serjeanty at the period of which we are now writing: there are several marks of difference between this description and that given by Bracton; the principal of which is, that both were now required to be held of the king (b).

There was a species of socage called *tenure in burgage*; which was, where there was an ancient borough, and those who had lands therein held them of the king, or of some lord, by a yearly rent (c). This was so called, says Littleton, "because they were holden of the lord of the borough (d)." It was besides reasonable, that this species of socage should be distinguished from others, as lands under this description were governed, very often, by a peculiar custom differing from the common law. Thus, in some boroughs it was the custom for the youngest son to inherit such burgage-tenures; which usage was called *Borough-English* (e): in others, the wife used to have all her husband's lands in dower: in others, a man might devise his lands in fee-simple by his last will, and the devisee might enter without livery of seisin (f).

There were two ancient tenures that had received a great blow from the statute of *quia emptores*, &c. 18 Ed. I. These were tenures in *frankalmoigne*, and by *homage auncestrall*. Tenure in *frankalmoigne* was, when land was granted to an abbot, dean and chapter, a parson, or other religious person, and his successors, *in puram et perpetuam eleemosynam*. Such persons were bound before God to make orisons, prayers, masses, and other divine services for the soul of the grantor and those that were his heirs, and the prosperity and long life of those who

(a) Litt. 159, 160.

(b) Vid. ant. vol. II, 232.

(c) Litt. 162, 163.

(d) Litt. 164.

(e) Ibid. 165.

(f) Ibid. 166, 167.

were not. Such tenants, says Littleton, did no fealty, or other earthly service, all which they supplied by the above spiritual acknowledgment and remembrance; and there was no remedy, in case of remissness in such service, but complaint to the ordinary or visitor (*a*). However, if the service so reserved was specifically and certainly named, as to sing a mass every Friday, or every year at such a day to sing a *placebo* & *dirige*, &c. and the like; or to find a chaplain, or to distribute alms of one hundred pence to a hundred poor men at such a day; in such cases, the lord might distrain for failure of service, and he should have fealty: but this was not properly a tenure in *frankalmoigne*, but was called tenure *by divine service*; and seems, in some measure, to correspond with what Bracton calls *in liberam et perpetuam eleemosynam*, which was subject to service, because the epithet *puram* was not added in the deed of gift (*b*). But Littleton seems to consider these two expressions as equally signifying *frankalmoigne*, and he makes the distinction to consist in the specification of service; for none, says he, can hold in *frankalmoigne*, if there be expressed any manner of service (*c*).

Since the statute of *quia emptores* (*d*) no gifts could be made *in pure alms*, or in *frankalmoigne*; for that statute ordains, that none should alien, or grant lands or tenements in fee-simple to hold of himself: if, therefore, any held lands by knight's service, and granted by licence in *frankalmoigne*, the religious grantee would immediately hold by knight's service of the same lord of whom the grantor held, and not of the grantor. The king, however, not being within that statute, might still grant lands in *frankalmoigne* (*e*). Again, if a tenant in *frankalmoigne* aliened the land to a secular person in fee-simple, the grantee would be required to do fealty to the lord, because

(*a*) Litt. 133, 134, 135, 136.

(*b*) Vid. ant. vol. I. 303.

(*c*) Litt. 137.

(*d*) Vid. ant. vol. II. 223.

(*e*) Litt. 140.

he was not able to hold in frankalmoigne, and the law would not allow the lord to be deprived of all service (*a*). It was for a similar reason, that lands in frankalmoigne could only be held of the grantor; for if there was lord, mesne, and tenant, and the tenant held in frankalmoigne, and the mesnalty escheated to the lord paramount, then the tenant would cease to hold in frankalmoigne, and would hold of the lord paramount by fealty (*b*). Such mesne grantor, before escheat, was by the nature of this tenure bound to acquit his tenant in frankalmoigne against the lord paramount (*c*).

The tenure by *homage ancestrall* is another holding that received a check by the statute *quia emptores*; which provision, as it enlarged the power to alien, gave tenants an occasion of breaking the mutual connexion on which this tenure depended. For this tenure subsisted only where there was a double prescription, both in the blood of the lord and of the tenant; that is, where the tenant and his ancestors had held the same land of the lord and his ancestors time out of memory of man, and had done homage. This tenure is spoken of by Bracton as a very common holding in his days: most of that which he says on the dependence between the lord and his homager, and upon the warranty that followed from the doing of homage, seems to refer to this pure and original tenure by homage (*d*). As alienation became more frequent and easy, the number of these holdings diminished, and probably very few were in being in the reigns of Henry VI. and Edward IV. However, the legal consideration of homage *ancestrall* was treated in the same way as in the early period of our law. Thus it was held, that the service of homage *ancestrall* drew to it an implied warranty, and an acquittal against the lord paramount, when homage had been once done by the tenant to the lord (*e*). So strictly

(*a*) Litt. 139. (*b*) Ibid. 141. (*c*) Ibid. 142. (*d*) Vid. ant. vol. I. 277.

(*e*) Litt. 143, 144.

was a privity and prescription required by law, that should such a tenant alien and take back an estate in fee from the alienee, though he held the land by homage, yet it would not be homage ancestrall, nor could he have the warranty and acquittal incident to such tenure (*a*). It is plain, from the nature of the thing, that a tenant by homage ancestrall might hold either by knight-service or socage (*b*).

This brings us to speak of *homage* in general, which, as well as *fealty*, is treated by Littleton in the way in which it had been delivered by our ancient writers. Homage and fealty were the great bonds between lord and tenant, and, when once established, were too sacred to be altered in substance. Notwithstanding they have been frequently mentioned before (*c*), yet the nature of our inquiry calls upon us to lay before the reader such new lights as are furnished in the more advanced stages of the history of our tenures.

Homage. Homage is stated by Littleton to be the most honourable and most humble service of reverence that a franktenant could do to his lord; for he was to be ungirt and his head uncovered; the lord was to sit; the tenant was to kneel, and hold his hands jointly together between the hands of his lord, and say thus: "I become
 " your man from this day forward, of life and limb, and of
 " earthly worship; and unto you shall be true and faithful,
 " and bear you faith for the tenements that I claim to hold
 " of you, saving the faith I owe to our sovereign lord the
 " king;" and then the lord, still sitting, was to kiss him. But if the tenant was a man of religion, or a woman sole, it was thought not decorous for such a person to say, "I
 " become your man, or your woman;" therefore they used to say, "I do to you homage, and to you shall be faithful
 " and true; and faith to you shall bear for the tenements I hold
 " of you, saving the faith I owe to our sovereign lord the

(*a*) Lit. 147.
 vol. II. 311.

(*b*) Ibid. 152.

(*c*) Vid. ant. vol. I. 277. and

king (a)." If the tenant held also other lands of other lords, he added likewise this exception, "And saving the faith I owe to my other lords (b):" which ceremony corresponds with the precedents of former times.

It was still held, as in Bracton's time, that none were to do homage but those who had an estate in fee, or in tail, in their own right, or in the right of another; for it was a maxim of law, "that a tenant for life should neither do "nor receive homage." Thus if a man became tenant by the courtesy, he was to do homage; but if the wife died before homage done by the husband, then he was not to do homage, because he had but an estate for life (c). Homage was to be done only once in the tenant's life; therefore, though he was obliged to do fealty to the heir of his lord, he was excused from homage (d). The same if the lord granted the services, and the tenant attorned, he should not be compelled to do homage, but should do fealty, notwithstanding he had done it before; for fealty was incident to every attornment of the tenant, when the seignory was granted. But it was not the same upon a recovery as upon a grant; for if a stranger recovered against the lord upon a *præcipe*, the tenant was obliged to do homage again to the recoveror (e). Many cases are stated by Bracton, where the lord might transfer the homage, and the tenant, of course, be compelled to do homage a second time, all which seem now not to be law (f).

When the tenant did *fealty*, he was to hold his right hand upon the book, and say thus: "Know Fealty.
 "you this, my lord, that I shall be faithful and true to you,
 "and faith to you shall bear for the lands which I claim to
 "hold of you; and that I shall lawfully do to you the cus-
 "toms and services which I ought to do at the terms
 "assigned, so help me God, and his saints;" and then he was to kiss the book. He was not to kneel when he did

(a) Litt. 85, 86, 87. (b) Ibid. 89. (c) Ibid. 90. [(d) Ibid. 148.

(e) Ibid. 149.

(f) Vid. ant. vol. I. 281.

his fealty, nor make such humble reverence as in homage. Again, homage could only be done to the lord himself; but the steward of the lord's court or bailiff might take the fealty (a).

Fealty was incident to all manner of tenure, except tenure in frankalmoigne; and it was no uncommon tenure to hold by fealty only (b). Thus if lands were let for term of life, without reserving any rent, the tenant was still to do fealty to the lessor, because he *held* of him. For the same reason it was said, that a termor for years should do fealty to the lessor; such a lessee being said, in the writ of waste, to *hold* of the lessor; but a tenant at will, as he had no sure estate, was not to do fealty. Those who held by copy of court-roll, by the custom of a manor, (which new description of tenants will be considered presently) were bound to do fealty (c).

We have hitherto confined our discourse to free tenures; it remains to add something upon the subject of tenure in villenage, and the new tenures that had lately been growing out of it.

Villenage. Since the time of Henry III. little has been said of *villenage*, considered either as a condition in society, or as a *tenure* (d). The proper and primary notion of villenage was, when a person, being villain to a lord, held also of that lord certain lands or tenements at the will of the lord, to do villain-services; as to carry the lord's dung out of the city, or off the manor, to put it upon the land, and similar predial labours. But such had been the revolutions in society, and the changes of property, it now very commonly happened, that some persons who were free, had become possessed of lands burthened with such services; and such tenure was still called villenage, though the persons themselves were no villains. Others, on the contrary, who were villains, had yet no land at all

(a) Litt. 91, 92.

(b) Ibid. 130, 131.

(c) Ibid. 132.

(d) Vid. ant. vol. I. 268, 269, 270.

to hold in lieu of such services, which they were, nevertheless, still bound to perform. Another change that had taken place was, that the villain-services were no longer indeterminate, and wholly at the will of the lord, as in the time of Bracton, but were universally limited (as even in his time they were in the case of one sort of villains, called villain-sockmen) by the custom that had immemorially prevailed in the manor (a). Thus the universal character of tenure in villenage, was a *holding according to the custom of a manor, or otherwise at the will of the lord* (b). With this qualification, the law of villenage stood mostly on the footing it was on in the age of Bracton.

As to the persons of villains, they were either such by prescription, so that a villain and his ancestors had been villains time out of mind of man, or by acknowledgment and confession in a court of record (c). Again, villains were said to be *regardant*, or *in gross*. The former were in the nature of the original and proper villains, namely, such as had belonged, they and their ancestors, to a manor, time out of the memory of man. The latter were such as had been granted by deed from one to another, in consequence of which they became villains in gross, and not regardant: a man and his ancestors might perhaps have been seised of a villain and his ancestors, who were such in gross, beyond the memory of man (d). A man who confessed himself a villain in a court of record, was a villain in gross (e). A female villain was called a *niese* (f).

These were the divisions and species of villains. Some points of law, as now understood, concerning this sort of persons, were as follow. If a villain took a free woman to wife, and had issue, the children were considered by the law as villains; on the other hand, if a niese married a freeman, the issue were free. In this an analogy seems to have been preserved towards our law of descents, which

(a) Litt. 172.

(b) Ibid.

(c) Ibid. 175.

(d) Ibid. 181, 182.

(e) Ibid. 185.

(f) Ibid. 186.

gave a preference to the male line, in direct contradiction to the civil law, which in a similar case pronounced, that *partus sequitur ventrem* (a). The sentence of the law against a bastard, that he was *quasi nullius filius*, was permitted, in this instance, to operate in favour of such persons, for no bastard could be a villain by descent; nor, of course, any otherwise than by confession in a court of record (b).

It was an old rule, that *quicquid per servum acquiritur, id domino acquiritur*; and this still prevailed with all its influence. Thus, though a freeman, by purchasing land held in villenage, did not lose his freedom, yet a villain might make free land become villain to his lord; as where a villain purchased land in fee-simple, or fee-tail, the lord of the villain might enter thereon, and oust the villain and his heirs for ever; and if he pleased, might afterwards grant the same land to the villain, to hold in villenage (c). But if the villain aliened before the lord entered, then the lord was precluded from entering at all, having nothing to blame but his own neglect: the same of goods, if the villain sold or gave them before they were seized by the lord. In case of goods, it was sufficient if the lord claimed the goods openly among the neighbours, and seized part in name of the whole, for this gave him a complete possession of the whole (d); but in both cases of lands and goods, the king might follow them into whatsoever hands they passed, for *nullum tempus occurrit regi* (e). Where a reversion or an advowson was purchased by a villain, it was enough for the lord to claim it in the above way, during the life of the particular tenant or incumbent (f). A villain was held competent to sue all manner of actions against any person but his lord; and even against him, he might have an appeal of his ancestor's death. A niefie might have an appeal of rape; a villain might have an action as executor against his lord,

(a) Litt. 187. Fortescue, c. 42. (b) Litt. 188. (c) Ibid. 172.
(d) Ibid. 177. (e) Ibid. 178. (f) Ibid. 179, 180.

because it was to the use of the testator. But in all these cases it was expedient for the lord to make protestation that the plaintiff was his villain, otherwise he would be enfranchised, even though the matter was finally determined for the lord, and against the villain. It was the opinion of Littleton, that a villain could not have an appeal of mayhem against his lord, because he would recover only damages, which the lord might by law retake, as soon as they were taken in execution; but he might unquestionably have an indictment (*a*), for the lord was not allowed by law to maim his villain.

If a villain was made a secular priest, his lord might seize him, though he was not permitted to recover him, if he had entered into religion, because he was then considered as dead in law; nor could he retake his niece if a freeman married her: but in both these cases he might have an action; in the latter against the husband, and in the former against the sovereign of the house, for damages in taking his villain without his licence (*b*).

Manumissions were generally performed by deed, but many acts were considered as implied manumissions. Thus if the lord made an obligation to his villain for a certain sum of money; or granted him an annuity; or let him lands for a term of years by deed; or by a feoffment without a deed, with livery of seisin; these were implied enfranchisements: but not so if he made him a lease at will, whether with deed or without, because it carried no certainty with it (*c*). If the lord sued a *præcipe quodd reddat* against his villain and recovered, or was nonsuit after appearance, this was construed to be a manumission, because he might by law have made an entry without suit: in like manner, if he brought an action of debt, accompt, covenant, trespass, or the like; for such suit was wholly unnecessary, as he had, by law, a power to imprison the villain and take his goods;

(*a*) Lit. 189, 190, 191, 192, 194.

(*b*) Ibid. 202.

(*c*) Ibid. 204, 205, 206, 207.

but the same conclusion would not be drawn from an appeal, because, says Littleton, the lord could not hang him without such a suit. However, if the appeal was found against the lord, and no indictment was pending to save the damages, the villain, it was thought, would be enfranchised, on account of the judgment for damages against his lord (a).

Thus stood the law respecting such persons as still continued in a state of villenage. These were greatly diminished in number; but it appears from what has just been said, that their condition was not alleviated from what it had been in the earlier times of our law. While the *persons* of villains were left to labour under all the rigours of the ancient villenage, the *tenure* of villenage had been long in the habit of increasing its franchises, and had now obtained some degree of emancipation. The tenure in *pure villenage* (as was before observed) was no where now to be found; but all tenants of that description had obtained those privileges which Bracton gives to such, as, in his time, held in what was called *villain socage* (b). These privileges were silently obtained by custom and usage, confirmed by lapse of time, and defended by the legal security of prescription. As the land so holden ceased to be possessed in a precarious way, it begun gradually to lose its ancient denomination. In the 4 Ed. I. we find mention of copyholds. of *custumarii tenentes*, which probably meant the very persons in question (c). Towards the latter end of the reign of Edward III. we meet with a new appellation; and as the former new term expressed the foundation and *title* to their estate, the latter denoted the *evidence* of such title: they are called *tenants per roll solonque le volunt le seigniour* (d). In the reign of Henry IV. they are called *tenants per le verge*, which was expressive of their peculiar

(a) Litt. 208.
Manerii, 4 Ed. 1.

(b) Vid. ant. vol. I. 270.
(d) 42 Ed. III. 35.

(c) Stat. Extenta

mode of conveyance (a); and in the next reign (b) they are called *copyholders* (c), meaning the *copy* of the *roll* of the lord's court.

At the period of which we are now writing, this new holding had become an acknowledged branch of the law of tenures, and is treated by Littleton with his usual precision and fulness. He says, that "*tenant by copie of court-roll*, is where a man is seised of a manor, within which there is a custom, that has been used time out of mind of man, that certain tenants within the same manour have used to have lands and tenements to hold to them and their heirs in fee-simple, in fee-tail, or for term of life, &c. at the will of the lord, according to the custom of the same manour (d)." This is the description of copyholds given by Littleton. These tenants, as has been before observed, could not alien their lands by deed, for in such case the lord might enter as for a forfeiture; but the course was to surrender the land in court, according to the custom, into the hands of the lord, to the use of him who was to have the estate; upon which occasion an entry used to be made on the roll to the following effect. *Ad hanc curiam venit A. de B. et sursum reddidit in eâdem curiâ unum messuagium, &c. in manus domini, ad usum C. de D. et hæredum suorum. Et super hoc venit prædictus C. de D. et cepit de domino in eâdem curiâ messuagium præd. &c. habendum et tenendum sibi et hæredibus suis, ad voluntatem domini secundum consuetudinem manerii, faciendo et reddendo inde redditus servitia et consuetudines inde prius debita et consueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.* A copy of this court-roll was all the evidence or muniment of such an estate (e).

If these copyholders did not purchase and convey their estates by the same solemnity as was used in the transfer of common-law estates, so neither could they implead or be

(a) 14 Hen. IV. 34.

(b) 1 Hen. V. 11.

(c) 1 Inst. 58.

(d) Litt. 73.

(e) Ibid. 73, 74, 75.

impleaded for their lands by the king's writ; but the course was to enter a plaint in the lord's court, to this effect; *A. de B. queritur versus C. de D. de placito terræ, videlicet, de &c. cum pertinentiis, et facit protestationem sequi querelam istam in naturâ brevis domini regis mortis antecessoris, &c. ad communem legem, &c. &c. Plegii de prosequendo, &c. &c. (a).*

Although copyholders had an inheritance, yet it was only an inheritance by the custom of the manor; as such an estate was still, in its very nature, and by the common law of the land, at the will of the lord. This mark of their original baseness hung about copyhold-estates, so heavily, that it continued to be the opinion of some, even so low down as the reign of Edward IV. that if the lord should oust such a tenant, he had no other remedy but to sue to the lord by *petition*; for if he had any remedy that was at all compulsory, it was asked, how could he be said to hold *at the will* of the lord? Notwithstanding this argument, from that part of the description of these tenants by which they were made to depend on the will of the lord, yet it might be answered, that this will was not to violate the established and immemorial custom of the manor, which was always too reasonable to permit a lord to do injustice to his tenants (*b*). And it was the opinion of Sir Robert Danby, chief-justice of the court of common-pleas in the 7 Edward IV. and afterwards of Sir Thomas Brian, his successor, in the 21st year of that king, that the copyholder doing his customs and services should, if put out by his lord, have an action of trespass against him (*c*): and this seems to be the inclination of Littleton's opinion on the same point.

Copyholders, in some parts of the country, were frequently denominated from the symbol and ceremony of surrender and grant, and were called *tenants by the verge*; because when land was to be surrendered, the tenant used

(a) Litt. 76.

(b) Ibid. 77.

(c) 1 Inst. 61.

to have a little verge or rod in his hand, which he delivered to the steward or bailiff, who delivered to the person taking the land the same verge, or another, in name of seisin (a). There was another method of surrender and grant, which does not seem, however, to have acquired any particular name; as a surrender to the bailiff or reeve, or to two *probi homines* of the same lordship, who used to present such surrender at the next court; and in both these cases, the *copy of the court-roll* was still the evidence of the title (b). Besides these, there were many other different customs in different manors, too numerous to recount; all which the law in this as well as other cases would recognise, so long as they were reasonable (c).

As to the length of time that was necessary to give validity to customs and usages, it was laid down that no custom was to be allowed, but such as had been used by title of prescription, that is, *from time out of mind*. But there was a difference of opinion as to what should be deemed time out of mind; some reckoning it from the limitation in a writ of right; which by the stat. Westm. 1. was fixed at the beginning of the reign of Rich. I. Others, again, admitted such to be a good prescription; but, they said, there was another title of prescription at the common law, long before that statute; and that was, where a custom had been used for time, *whereof the memory of man runneth not to the contrary*. They founded their notion upon the form of pleading a custom, which was by suggesting it in the above phrase; and this was the same as saying, that no man then alive had any proof or knowledge to the contrary (d). This seems to be the opinion of Littleton, and that which is consonant to reason and practice; for otherwise no custom could have gained birth after that distant period; though great part of the common law, which is custom, had confessedly originated since.

(a) Litt. 78.

(b) Ibid. 79.

(c) Ibid. 80.

(d) Ibid. 170.

Of rents. We cannot dismiss the subject of tenures and services without taking notice of a title in the law which was connected with them, and had now grown to a considerable size: this is, the title of *rents*. A rent, in its original form, was a compensation reserved to a grantor, in acknowledgment of a grant of lands or tenements; and in this light it may strictly be ranked among the other services we have just been mentioning: but a rent issuing out of land carried with it such a permanency, as put it on the footing of real property; and for that reason a charge of this sort was created on many other occasions than where a proper service could be reserved. Rents were purchased and transferred with less ceremony than land; and on that account recommended themselves, like uses, as a commodious species of property. All through the reigns of Edward III. and his successors, rents in different shapes had been a common object of conveyance, and the law relating thereto underwent various discussion. Very little regard has yet been paid to this branch of the law in the present historical inquiry; but now it had become of too much importance to be passed over.

Rents were of three kinds: that is, *rent service*, *rent charge*, and *rent seck*. The former of these was (as was before mentioned) where a tenant held his land by fealty, and certain rent; or by homage, fealty, and certain rent; or by any other service, and certain rent; and if such rent was not paid at the day, the lord was authorized by the common law to distrain for it (*a*), even though the gift was made without deed: this was also the case where lands were given in tail, or a lease was made for life, or for years, rendering rent (*b*). But, in order to make this a rent service, the reversion must remain in the donor, or lessor; for if a feoffment was made in fee, or a gift in tail, with a remainder over in fee, without deed, reserving a rent, this reservation would be void; because no reversion

(*a*) Litt. 213.

(*b*) Ibid. 214.

remained in the donor, and the tenant held his land immediately of the lord, of whom his donor before held (a).

It was the alteration in tenures, made by the statute *quia emptores*, that occasioned this difference in the nature of such rents. Before that act, if a man made a feoffment in fee, yielding a certain rent to him and his heirs, this was a rent service, because there was a tenure subsisting between such feoffor and feoffee (b): but since that statute, such a feoffment in fee, or a feoffment in tail, or for life, with a remainder over in fee, would not make a tenure between the feoffor and feoffee, for the feoffee would hold of the chief lord paramount. If a rent therefore was reserved by deed, on such a feoffment, with a clause enabling the feoffor and his heirs to distrain, this would be a rent charge, and not a rent service; because it arose by force of the writing only, and not by operation of law; and if there was no clause of distress, it would be a rent *seck* (c). Again, if a man granted a yearly rent to be issuing out of land to another in fee, or in tail, or for life, and the like, with a clause of distress, this would be a rent charge; and if it was without a clause of distress, it would be a rent *seck*. Rent *seck*, says Littleton, was, as it were, *redditus siccus*, because no distress was incident to it (d).

There were many ways in which a rent service might become a rent *seck*. Thus, if a tenant held by fealty and certain rent, and the lord granted the rent by deed, reserving the fealty, and the tenant attorned; here, because the tenements were not holden of the grantee, but of the lord, who reserved the fealty, the rent would be a rent *seck* (e). If the lord granted the homage of his tenant, reserving to himself the remnant of his services, and the tenant attorned, the tenure would be of the grantee, and the rent was *seck* (f). The same if land was let for life, and

(a) Litt. 215.

(b) Ibid. 216.

(c) Ibid. 217.

(d) Ibid. 218.

(e) Ibid. 225.

(f) Ibid. 226.

the lessor granted the rent to another, reserving the reversion, this rent would be seck, because the grantee had nothing in the reversion (*a*). Under the name of "reversion," the rent and services would all pass, as incident thereto (*b*).

If a person who had a rent charge, or rent seck, was once seised thereof, and the tenant did not keep up his payments, his remedy was to go to the land, and demand it; and if it was denied, or the tenant was not there ready to pay it, which amounted to a denial; in either case this was a disseisin of the rent, for which he might have an assise; and if after recovery and execution it was again denied, this was a redisseisin (*c*). But if the grantee was denied the rent at the first day of payment, then he had no seisin, and so no remedy whatsoever to recover it; and therefore it was usual for the tenant, when he attorned to the grantee, to give a penny, or something, in the name of seisin of the rent, which intitled him to an assise after a denial; for the delivery of the deed of grant gave not such a seisin of the rent as to maintain an assise.

The remedy for recovery of rents was sometimes twofold. Thus, in case of a rent charge, the grantee might chuse whether he would sue a writ of annuity or make a distress: but he could not do both; for an avowal of a taking would charge the land and discharge the person (*d*). If a grantor chose not to be liable personally, he might add a clause, providing, that the grant should not extend to charge the person by writ of annuity, but only to charge the lands and teneiments, &c. (*e*). Again, should the deed of grant run thus, "that if *A.* of *B.* be not yearly paid at "the feast of Christmas, for the term of his life, twenty "shillings, then it shall be lawful for the said *A.* of *B.* to "distrain for it in the manor of *G.* &c." here, because no annuity was expressly granted, but only that the grantee

(*a*) Litt. 228.

(*b*) Ibid. 229.

(*c*) Ibid. 233.

(*d*) Ibid. 219.

(*e*) Ibid. 220.

might *distrain* for such an annuity, the person was considered as not charged, but only the land (*a*).

There were some curious points of law on the extinction and apportionment of rents. If a man had a rent charge to him and his heirs, and purchased in fee any part of the land out of which it issued, the whole rent was extinct, and could neither be recovered by distress nor by writ of annuity. Yet, if it was a rent service, it would not be an extinguishment of the whole, but the rent would be apportioned according to the value of the land. In some instances, however, a service would be extinguished; as where land was held by the service of rendering to the lord yearly, at such a feast, a horse, a golden spear, or a clove-gilliflower, and the like. If the lord purchased part of the land, the service, as it could not be severed or apportioned, would be taken away (*b*). But where a man held by homage, fealty, and escuage, and certain rent; there, in the above case, the rent and escuage would be apportioned, and the homage and fealty abide intire to the lord for the rest of the land (*c*). It being required by law, that the land should be held by some service, and as these were not expensive, they could not come under the same reason as a horse, golden spear, or other intire service, which the tenant, after the land was divided, might not be able to provide.

There was likewise a difference, where the grantee of a rent charge came to part of the land by his own act, and where by course of law. For if a man had a rent charge, and his father purchased part of the land, and this part descended to the son, then the rent charge would be apportioned according to the value of the land (*d*).

There were other circumstances which amounted to a disseisin of rent; and such as were a disseisin in the case of one sort of rent, were not so in the case of another. This

(*a*) Litt. 221.

(*b*) Ibid. 222.

(*c*) Ibid. 223.

(*d*) Ibid. 224.

has been touched before (*a*), and the law seems now to be laid down nearly in the same manner; that is, there were three causes of disseisin of a *rent service*; namely, rescous, replevin, and inclosure (*b*). There were four causes of disseisin of a rent charge, namely, rescous, replevin, inclosure, and denial; and only two causes of disseisin of a rent seck, namely, denial and inclosure: a menace to prevent a distress was a disseisin of the three kinds of rents (*c*).

Such was the shape in which the law of tenures appeared in the reigns of these two kings. From thence we shall proceed to consider the nature of estates.

After what has been said in the reign of Edward III. on the law of entails and limitations in remainder, very little need be added to this part of our subject. The curiosities that arose on these topics constitute no small part of the learning of real property during this period. To enter into a detail of such inquiries would lead us too far; and the great outline of estates-tail, as delivered by Littleton, corresponds so exactly with what has already been mentioned (*d*), that it would be an unnecessary recapitulation to adopt much from this great authority.

The manner in which this author divides estates-tail is this: If lands were given to a man and the heirs of his body begotten, this he calls a *general tail*; because, whatsoever woman he married, every one of his issue by possibility might inherit as issue of his body. A *special tail* was, where lands were given to a man and his wife, and the heirs of their two bodies begotten; because none could inherit but the issue of those two persons: all these, as well as gifts in frank-marriage, were specified in the statute *de donis*. Other estates-tail, says our author, were by the equity of the statute; as lands to a man and the heirs male of his body begotten, or heirs female of his body begotten (*e*).

(*a*) Vid. ant. 17. (*b*) Litt. 237. (*c*) Ibid. 238, 239, 240.

(*d*) Vid. ant. 129. (*e*) From sect. 14 to 21.

Among other instances of agreement with the old law of entails, it is expressly laid down by Littleton, that in case of a limitation in tail male, and the donee having issue a daughter who had issue a son, such son could not inherit *per formam doni*; because he ought to convey his descent wholly by the heirs male (*a*). Opinions, though of no great authority, had gone so far as to say, it would be otherwise in a devise (*b*). Where a limitation was made in tail female, the daughter would take by descent in exclusion of the son; and this was by force of the statute; but it was not so in case of a purchase. For where land was given for life, with remainder to the heirs female of the body of *T. S.* who died and left issue a son and a daughter, after which the tenant for life died; here it was held, that the daughter could take nothing, because she was not heir; for she must be both *heir* and *heir female* to answer the limitation of the deed, which she could not be during the life of her brother (*c*).

If lands were given to a man and his wife and the heirs of the body of the man, there the husband was construed to have an estate in general tail, and the wife but an estate for term of life: if to the husband and wife, and *the heirs of the husband* which he should beget on the body of his wife, there the husband had an estate in special tail, and the wife an estate for life (*d*): but if to the husband and wife, and to the *heirs* which the husband should beget on the body of the wife, there both of them had an estate-tail, because the word *heirs* was not limited to one more than the other (*e*). If it was to a man and *his* heirs which he should beget on the body of his wife, there the husband had an estate in special tail, and the wife nothing (*f*). A gift to a man and his heirs male, or to a man and his heirs female, was held to be a fee-simple, because it was not li-

(*a*) Litt. 24. Vid. ant. 6. (*b*) 1 Inst. 25. (*c*) 9 Hen. VI. 25. (*d*)

(*d*) Litt. 26, 27. Vid. ant. 6. (*e*) Ibid. 28. (*f*) Ibid. 29. (*f*)

mitted of what *body* the heirs should be (*a*). For these estates were not only *fees* but *fees-tail*; and therefore, as it was necessary to have the word *heirs* to convey a fee, it was likewise necessary to have the word *body*, to create a fee-tail (*b*).

The title of *tenant in tail after possibility of issue extinct*, is described by Littleton with more latitude than in the *Old Tenures* (*c*). It is there instanced in a special tail to a man *and* his wife: but now we find, if lands were given to a man and his heir which he shall beget on the body of his wife, where the wife had nothing, and the husband was donee in special tail, the husband might be tenant after possibility (*d*). No one could be tenant in tail after possibility of issue extinct, but one of the donees being donee in special tail; for a donee in general tail was always within the possibility of having issue; and for the same reason, the issue to such donee in special tail could never be tenant in tail after possibility of issue extinct (*e*).

There is one species of estates in special tail, called estates in *frank-marriage*, which were very ancient gifts at common law, and are mentioned in the statute *de donis* (*f*); since which it was held, that land given with a wife in frank-marriage was, without any other limitation, an estate to the husband and wife, and to the heirs between them begotten; and therefore, that the issue of the second wife could not inherit it (*g*). Since the times of Glanville and Bracton, who speak very particularly of these gifts, the law had altered as to the exemption allowed to such donees and their heirs from doing service. It is clearly laid down by both those writers, that the third heir, or, as Bracton (*h*) more particularly calculates it, the issue in the fourth degree (reckoning the donee as in the first degree) should

(*a*) Litt. 31. (*b*) Bro. Tail. 3. (*c*) Vid. ant. 6. (*d*) Litt. 33.
 (*e*) Ibid. 34. (*f*) Vid. ant. vol. I. 297. and vol. II. 164, 165. (*g*) Litt. 17.
 (*h*) Vid. ant. vol. I. 297.

commence doing the services ; whereas it is said by Littleton, that the fourth degree should pass, and the issue in the fifth degree should do the first service (*a*). The reason given for requiring them then to do the accustomed services is, that the issue past the fourth degree might marry by the canon law : no reason is given for the different limitation made by our older writers. This exemption from service did not, however, include fealty, which must be performed by the donee and the immediate issue (*b*) ; and after the fourth degree, homage and the other services were to be performed. In the early times of our law, all gifts to a woman in order to her marriage, were called *maritagia* ; and were distinguished into those that were *free*, and those that were not ; but now the term was used only as coupled with the former epithet, and we no longer hear of any but gifts in *FRANK-marriage*.

The title of tenant *per legem Angliæ*, or *by the courtesy of England*, was in our old law derived from gifts in *maritagia* (*c*). When land was given in such a way to a woman, and a child was born, the husband, after her death, enjoyed it for life as tenant *per legem Angliæ*. Thus the law stood in the time of Glanville. In the time of Bracton, this *jus mariti* was extended to *all* inheritances. So the law continued ; and conformably thereto it is laid down by Littleton, that when a man took a wife seised in fee-simple, or in fee-tail general, or, as Littleton adds, seised as heir in special tail, he should be tenant by the courtesy, if any issue were born (*d*). Thus a much larger field was opened for this claim of the husband than was warranted by the opinions of our older lawyers.

Thus stood the law respecting estates that were founded on the statute *de donis*.

The ill success of some attempts that were made to re-

(*a*) Litt. 19. (*b*) Ibid. 19. (*c*) Vid. ant. vol. I. 122, 298.

(*d*) Litt. 35.

fine on the restrictions of the statute *de donis*, and the manner in which such attempts were treated by the courts, shew that some doubts began to be entertained concerning the wisdom and policy of long entails. We are told (a), ^{Perpetuities} that in the reign of Richard II. *Richel*, a declared void. judge of the common pleas, having issue many sons, made a settlement on them in tail, one after another; with a condition, that if any one of the sons aliened in fee, or in tail, then his estate should cease and be void, and the land should immediately remain to the next in the entail; a condition which became now necessary for those to make, who apprehended the consequences of the judgment in *Octavian Lumbard's* case, determined in the reign of Edward III. (b) The framer of this deed, probably, did not doubt but such a condition would still be thought deserving the support once given to entails. But that inclination was gone off, and this new device of the judge was declared void by the court of common-pleas in the 2d year of Henry IV. A like settlement made by justice *Thirning* (c), in the reign of Henry IV. was also solemnly adjudged bad, in the 21st year of Henry VI. It is not enough to say, that entails were no longer favourites in our courts; for Littleton gives three learned reasons why the limitations above-mentioned were substantially void in law, in their original creation. First, because a remainder that commences by deed, ought to vest in him to whom it is limited, when livery of seisin is made to him who has the particular estate. Secondly, because if the son alien in fee, the fee-simple and freehold is in the alienee, and in none other; and, therefore, that such remainder could not possibly commence immediately after the alienation to a stranger. Thirdly, because upon the breach of the condition the donor ought to enter, and not the person in the remainder, who was no party to the condition: for all

(a) Litt. sect. 720.

(b) Vid. ant. 14.

(c) 1 Inst. 377. b.

which reasons this new-invented perpetuity, says he, was void in law (a).

But it was not sufficient to repress these extravagant refinements on entails. The statute *de donis* still operated with great force on landed property; and it was thought expedient to contrive some method of a general nature, which, to a certain degree, should have the effect of a repeal. In the course of the long contention for power between the Houses of York and Lancaster, some temporary motives might contribute to promote such an attempt. An impoverished gentry, and a nobility exhausted by the expences of the field, were eager to obtain a power of exchanging the slow produce of their inheritances for the common medium, which was current every where; and which could now be procured from a commons daily increasing in riches by the cultivation of foreign and domestic trade. Nor was this the only motive for making alienations of land. To persons of unembarrassed circumstances, to whom money afforded no temptation, a full dominion over their own property, if not a desire to alien, was extremely grateful. These were as much inclined as the former to avail themselves of any legal means of enlarging that dominion. To such, the possession of a clear fee-simple was far preferable to land, when under the tie and incumbrance of an entail; the owner might then satisfy his caprice in the full management and disposal of it, regardless how it lay open to the forfeitures and penalties which the law might enforce on property not entailed. The wishes of all these were at length gratified in the reign of Edward IV. and we shall now consider the steps which led to this important event.

We have seen (b), in the reign of Edward I. that the clergy had invented a method of conveying in mortmain, by means of a *feigned recovery*, upon a *præcipe quòd red-*

(a) Litt. sect. 721, 722, 723.

(b) Vid. ant. vol. II. 155.

dat, &c. Feigned recoveries continued still to be used as a mode of conveyance; and when they were not to the prejudice of any of the persons protected from them by the statutes of Edward I. they were accounted a good assurance to a purchasor, and recognised as such by the courts of law. During all the reign of Edward III. and his successors, there is repeated mention of recoveries, which can be understood in no other light than as modes of conveyance. But these, like other conveyances, if defective in any of their properties and requisites, were liable to be questioned by the parties, or their heirs; which was usually done by *falsifying the recovery*, in some action, either by assise or by *præcipe*. If the person suffering a recovery was tenant in fee, he was such a complete owner of the estate, that, provided all due forms were observed, none but termors could falsify such recovery. But if he was tenant in tail, an idea had prevailed, that the issue possessed a title paramount the tenant, which would enable him to falsify the recovery. This notion seems to have governed for some time; till at length, in the reigns of Henry IV. and V. some doubts began to be entertained, whether a recovery suffered by tenant in tail was not good against the issue; and it had accordingly become the practice for tenants in tail, who wanted to get rid of the entail, and sell their land, to convey under the sanction of a pretended recovery against them on a *præcipe quòd reddat, &c.*; for this (said they) being a solemn judgment, and supposed to be upon a right tried, the issue, who could have no better title than their ancestor, must acquiesce in the same judgment which barred him. Of this opinion was the court in the 3d of Henry VI. A writ of right was there brought against the tenant in tail; and upon his making default, the court shewed great reluctance in passing judgment, because, said they, it will bar the issue (a).

(a) 3 Hen. VI. 55. b.

An opinion so explicit as this, was sufficient to encourage this application of a recovery upon a *præcipe*. It seems delivered by the court as a common point of learning; it was probably nothing more than was generally admitted, and the very object, perhaps, the parties to that suit had in view. However, this continued, like many other prevailing notions which have not received the sanction of a judicial determination, without any very general effect; and the consequence of a feigned recovery barring an estate tail, was not a settled and established point of law; for in 7 Hen. VI. (a) it was said, if a tenant in tail lose by *false plea*, his issue may have a formedon against the demandant. But notwithstanding what was held respecting a *false plea*, it was contended as a thing of course, in 37 Hen. VI. that a recovery *by default* in a writ of right might be pleaded in bar of the issue in a formedon (b). This was not allowed by the counsel on the other side, who seem, notwithstanding, to agree, that such a recovery might bar all mesne charges, but not the issue, for they claimed paramount. It does not appear what judgment was given; for the cause was adjourned. This proves, that whatever the practice might be, there was, at least, a difference of opinion concerning this point, in the reign of Henry VI.

But this difference of opinion seems to have been confined principally to cases where the tenant suffered the recovery to be had against him by a plain and palpable collusion of *his own*, without maintaining his title, as he ought, by going to a fair and real trial. Of that complexion are all the cases that have hitherto been mentioned; and another which might be added from Littleton (c). But there was another method of suffering a recovery, than by the tenant's default; and that was by the tenant making his defence, and vouching over a warrantor, *whom* he might procure to make default; and then, the recovery not being

(a) 7 Hen. VI. 39.

(b) 37 Hen. VI. 31. b.

(c) Litt. sect. 688.

by the covin or collusion of the tenant, who had done all he could in vouching his warrantor, the judgment of recovery was complete by all the rules of law. Such recoveries are mentioned by Glanville, Bracton, and all the old writers, and were as fair a proceeding as any other adjudged cause could be. Among all the cases about recovering by default, there is no opinion, either one way or the other, on a recovery by default of the vouchee; but it should seem from the famous case of *Taltarum*, which will be mentioned presently, that no doubt was entertained about the effect of such a recovery to bar an entail. It seems that it had been long the practice to suffer recoveries in that way, for that very purpose; and that the decision, or rather the opinion, then delivered was nothing new.

Taltarum's case. The famous case of *Taltarum* is in 12 Ed. IV.; and has always been considered as closing this question: not that the court there directly decided the point; but that while they determined in that case *against* such a recovery *improperly* suffered, they seemed to admit, that a like recovery *properly* suffered would bar the issue in tail. The case was this: In a writ of entry on stat. 5 Ric. II. the defendant conveyed to himself a title under an entail: the plaintiff replied, that one *Taltarum* had before brought a writ of entry against an ancestor of the defendant, returnable at such a day; that the parties appeared, and *Taltarum* counted against him of his own possession; that the tenant made defence, and vouched to warranty one *King*, who was ready, and entered into the warranty, and the mise was joined on the right; that *Taltarum* imparled, and afterwards came into court; and the vouchee came not, but in contempt made default; upon which the demandant had final judgment against the tenant in tail, and he over against the vouchee; by force of which recovery *Taltarum* entered, and infeoffed the plaintiff. In this manner is the recovery pleaded. The defendant rejoined, that all this might be true, but that be-

fore the recovery by *Taltarum*, the tenant in tail had infeoffed another, who had re-infeoffed him in tail.

Upon these pleadings the following question arose: Whether the defendant who claimed under the first entail, was barred by a recovery suffered by his ancestor at the time he was seised of a later entail, created since? This was the point before the court. In debating the matter, it seemed to be agreed by the whole court, that a recovery by default of the vouchee was a bar to the issue in tail; and it seems as if they rested the reason of its being a bar entirely upon the recovery in value against the vouchee. Further, it was said by one of the judges, that an entail cannot be destroyed by a recovery in value, unless that which is recovered go in the place of the other; and that cannot be, unless the recovery in value be against the *donor*; in which case it was a settled point, if *A.* give land to *B.* in tail, and he recover in value against *A.* that the issue of *B.* shall have a formedon of the land so recovered. Consistently with this, as the recompence goes to that issue only who loses the estate, the defendant in the case in question, who claimed under an entail of which the tenant was *not seised* at the time of the recovery, could be intitled to no recompence in value, and therefore would not be barred by the recovery.

Thus did the court, in debating the effect of a bar by a recovery, confine itself to the strictest technical reasoning. Upon the principle which had been admitted in *Octavian Lumbard's* case, and recognised in some others, both in the reign of Edward III. and since, they considered a recompence to the issue as a sufficient reason for depriving him of his estate; and a recompence in value to the recoverer being part of the judgment in a recovery on a *præcipe*, this proceeding was, in its very frame, happily adapted to the purpose. A recovery seems to have forced itself upon the courts, who recognised its effects no further than they were obliged by the legal circumstances attending it. Their decision in this case was entirely conform-

able to the exact requisite of the proceeding; for they expected, as was before observed, that the vouchee should be the donor, who had actually engaged to warrant upon the original gift of the land (*a*).

Such were the grounds upon which a recovery was explained and supported, when it was supposed, or at least pretended, to be a real proceeding. In after-times, when it was considered merely as a fiction for the purpose of barring estates tail, the same language was adhered to, as the best way of reconciling it to reason and to law. But without recourse to these technical arguments, the application of a recovery to the purpose of barring entails, may be defended on other grounds equally consistent and legal. Why should it not be at once said, that the recoverer recovers the land by better title? a fiction, surely, as fair as that of a recovery in value to the issue. As this is the plain sense of it, when the *præcipe* is brought against a tenant in fee, why should it not, and why should it not be so avowed, when brought against a tenant in fee-tail?

It should seem, that a slight consideration of the statute (*b*) *de donis* will render such an apology as the inference drawn from a recovery in value, perfectly unnecessary. It was intended by that act to bind up the hands of the tenant in tail from prejudicing his issue, but not to preclude third persons from pursuing their lawful claims against the land entailed. It could not be said, as in opposition to *their right*, that the will of the donor should be observed. That statute provides only against *voluntary* alienations, and, among others, declares, that a fine levied of such entailed land shall be void; a fine being at that time an amicable suit for the single purpose of transferring the possession and right of land. But to all involuntary alienations, to all recoveries by right, such land entailed was still liable, notwithstanding the strict restraint on alienation by the owner. A *præcipe* was then an ad-

(*a*) 12 Ed. IV. 15. 19, 20, 21.

(*b*) Vid. ant. vol. II. 164.

versary suit; and though the churchmen had about that time converted it to its present use, even then, if a recovery was had thereon, it carried with it the pretence of a recovery by lawful title, and bound only as such. When such proceeding grew more general, it still bore its original import; and under all considerations of it, with regard to the recoveror, recoveree, and the thing recovered, will bear no other comment or conclusion, but that the recovery was had by lawful right, regularly decided upon. The statute *de donis* had not taken away such a mode of alienation; and, of course, an estate tail, in its very origin, was liable to be barred by a recovery in a judicial proceeding, as well as by a collateral warranty. The lord chief justice *Choke*, in the case abovementioned, seems to consider it in that light; and when that judge had been spoken of in later times, as the author of a new device for barring entails, he is very justly vindicated by the great commentator on Littleton, who says, "it was upon former authorities and opinions of judges, discovered by him, and assented to by the rest of the judges (a)."

Whatever may be the true reasons upon which this point of law is to be explained, it is certain that this solemn declaration of it by the judges had a more extensive influence than almost any thing that ever came from the courts at Westminster, respecting private rights. It made an epocha in the history of landed property. It had the effect, in a great measure, of repealing the statute *de donis*; for after this, every tenant in tail had a power of barring his issue, and those behind in remainder; not by compensating them with a real equivalent, as was required upon the principle of *Octavian Lumbard's* case, but by the supposed and ideal recompence of a recovery in value against the vouchee. The statute had thenceforward no other force than to enable persons to make entails, with long substitutions of

(a) 1 Inst. 361. b.

remainders, which could not have been created at common law, and which every tenant, as he came into possession, had the power of destroying by suffering a recovery; a power which was most commonly exercised as soon (a) as the party was of years to do a legal act.

Since the period when we had occasion to consider the widow's title to dower, a very material change had taken place in the judgment of the law on this subject. Glanville reckons three sorts of dower; that *ad ostium ecclesiæ*, that *ex assensu patris*, and the *rationabilis dos* assigned by

the common law. The two former were appointments made at the time of the marriage; and if these were not made, the widow had a title to claim the third of her husband's freehold; but in analogy with the idea on which the two former were to have been made, this was to be a third of such freehold as the husband was seised of on the day of the marriage (b). In the same manner is the *rationabilis dos* spoken of by Bracton and Fleta (c). But in the reign of Edward III. we find the widow's dower is said to be a third of all that was her husband's in his life, in fee-simple or fee-tail; as if acquisitions that had been made after the marriage were to be liable to dower. This alteration in the law of dower had obtained between the 13th of Edward I. and the latter part of Edward III. and might have crept into an established piece of law, from the liberty which was allowed even in the time of Glanville, for those who had but small freeholds at the time of assigning dower *ad ostium ecclesiæ*, to make some provisional engagement to augment it by such new purchases as might afterwards be made (d). Whatever might be the origin of this new doctrine, so thoroughly was it settled in the times of Henry VI. and Edward IV. that it was then laid down, that "where a man was seised of lands

(a) Black. vol. II.
vol. I. 312. Flet. fol. 341.

(b) Vid. ant. vol. I. 100.

(c) Vid. ant.

(d) Vid. ant. vol. I. 101.

“ or tenements in fee-simple, fee-tail general, or as heir in
“ specialtail, his wife should be endowed of the third part
“ of such lands and tenements as were her husband’s *at any*
“ *time during the coverture;*” so that not only what had
been acquired since the marriage, but also such as had
been conveyed away were now subject to the claim of
dower (a).

Again, dower *ad ostium ecclesiæ* was not permitted in
the time of Glanville to amount to more than a third; and
if it was more, it would be admeasured down to a fair
third. But it was laid down by Littleton, that such en-
dowment might be of the whole of a man’s land. To
make such a dower, the man must be of full age and seis-
ed in fee; it was to be done after affiance and troth pligh-
ed; and after the husband’s death the widow might enter
without any further assignment, the quantity and certainty
of the parcels having been openly declared at the time of
the endowment (b). Dower *ex assensu patris*, could like-
wise only be where the father was seised in fee; the per-
son endowing was to be son and heir apparent; and the
parcels were to be assigned with certainty, so that the
widow might enter without any further assignment. It
was thought that a deed should be made testifying the
father’s assent (c). There was this difference between
these two dowers, that a widow might waive that *ad ostium*
ecclesiæ, and resort to her dower at common law, contrary
to the usage in Glanville’s time; but if she had once en-
tered, she would be precluded from such option (d).

If a woman was not above nine years of age at the death
of her husband, the law pronounced that she should not
be endowed (e). A woman could not be endowed of
lands or tenements which her husband held jointly with
another, but otherwise of land he held in common (f).

(a) Litt. 36.

(b) Ibid. 39.

(c) Ibid. 40.

(d) Ibid. 41.

(e) Ibid. 36.

(f) Ibid. 45.

Neither a tenant in tail of full age, nor a tenant in fee within age, could endow *ad ostium ecclesiæ*; yet an infant could endow *ex assensu patris*, this not being construed to be an act of his own (a), but of his father.

Thus far of the three species of dower mentioned by the oldest writers upon our law. To these there is added by Littleton another, which he calls *de la plus beale*. This was where a man seised, for instance, of forty acres of land, held twenty acres of one by knight's service, and the other twenty acres of another in socage, and took a wife, and died leaving a son within age; so that the lord entered into one part as guardian in chivalry, and the widow into the other as guardian in socage. If the widow brought a writ of dower against the guardian, he might pray the court, that she should endow herself of *the most fair* of the tenements she held as guardian in socage, according to the value of the third she claimed in the tenements held by knight's service; upon which judgment would be given for the guardian in chivalry to hold his lands quit of the dower (b): after this judgment, the widow might call together her neighbours, and in their presence endow herself by metes and bounds of the fairest part of the tenements held in socage (c). Such regard was paid to the interest of the guardian in chivalry. Another species of dower mentioned by our author is, *dower by the custom*. Thus, in some counties, the widow might have the half of the tenements; and by the custom of some town or borough, the whole (d). Thus he reckons in all, five species of dower; namely, dower by the common law, dower by the custom, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la plus beale* (e).

The two estates of *tenant by the courtesy*, and *tenant by dower*, seem to have borne some relation to each other, as if the claim of the wife in one case, and of the husband in the other, were founded on equal considerations in law

(a) Litt. 46.57. (b) Ibid. 48. (c) Ibid. 49, 50. (d) Ibid. 37. (e) Ibid. 51.

and in policy. Thus a seisin in fee, in fee-tail general, or as heir in special tail, was laid down by Littleton as the proper estate in the husband to give a title of dower, and in the wife to make her husband tenant by the courtesy. And afterwards he states it still more specially, that where one of the parties was seised of such an estate, as by possibility the issue that might be had between them would inherit to its ancestor, there the other party should be intitled, as the case might be, to dower, or the courtesy, and otherwise not. For where tenements were given to a man and the heirs that he should beget on the body of his wife, which made the husband donee in special tail (not being one of the abovementioned estates), if he died without issue, yet the wife should be endowed; because the issue which she by possibility might have had by such husband, would have inherited the land. But if she had died, and he had taken another wife, this second wife would not be endowed, for the reason abovementioned (*a*); which latter case confirms likewise the above rule respecting the husband, he being neither seised in fee, nor in fee-tail general, nor heir in special tail. There was this great difference between the donee and the heir in special tail, that the latter was emancipated from all the peculiarities of the entail, and became a tenant in tail general.

The law concerning tenants for years had undergone no great alteration since the time of Bracton (*b*). It seems to have been governed by the same principles, and subject to the same rules. Such leases might be made by deed, or without; and if there was a remainder over for life, in tail, or in fee, the lessor was obliged to make livery of seisin to the lessee for years, or nothing would pass to those in remainder, by the entry of the lessee. If the termor entered before livery made, then the freehold and reversion were construed to remain in the lessor (*c*). When land was

(*a*) Litt. 52, 53.

(*b*) Vid. ant. vol. I. 301.

(*c*) Litt. 60.

so let for years, the lessee might enter after the death of the lessor, because he derived his title from the lease; which differed from a feoffment; for if livery was not made during the life of the feoffor, the feoffment was void, and the land descended to the heir of the feoffor (*a*). It was not uncommon to let tenements for the term of half a year, or quarter of a year; and if such tenants committed waste, the writ would nevertheless say, *quod tenet ad terminum annorum*; for no other form of writ could be had (*b*).

The precarious possession described by Bracton (*c*), seems still to have continued under the title of *tenant at will*. Littleton describes this as “a letting to have and to hold at the will of the lessor;” but it was understood to be at the will of the lessee, as well as of the lessor (*d*); and therefore, if a lease was made at the will of the lessor, the law inferred that it was also at the will of the lessee; for it must be at the will of both parties. When Littleton therefore says, that such a tenant had no certain nor sure estate, but might be put out whenever the lessor pleased, it should be added, that the lessee also might leave the land whenever he pleased. Nevertheless, the will of the lessor was not to be exercised in defiance of all justice and equity; for if the lessee sowed the land, and the lessor put him out before the corn was ripe, the lessee was to have free entry, egress and regress, to cut and carry the corn. But a lessee for years, who knew the end of his term, had not the like indulgence; for if he was so inconsiderate as to sow the land, when he knew his term would end before it was ripe, the lessor or reversioner would have it, by law (*e*). A tenant at will was not bound to sustain, and repair, as a termor for years was; but if he committed voluntary waste, in pulling down a house, felling trees, and the like, the lessor might have an action of trespass (*f*). The lessor might distrain or have

(*a*) Litt. 66.

(*b*) Ibid. 67.

(*c*) Vid. ant. vol. I. 303.

(*d*) 18 Hen. VI. 1.

(*e*) Litt. 168.

(*f*) Ibid. 71.

an action of debt for rent reserved on a lease at will (*a*). A feoffee to whom no livery of seisin had been made, was construed to be a tenant at will; for the words of the deed indicated the feoffor's will that he should have the land (*b*); but there being no livery, or specification of estate, he could not have it but at the will of the feoffor.

Conditional estates had always made an im-
 portant title in our law; they are treated of at Estates upon condition.
 large by Bracton (*c*); and the useful purpose such modifications of property answered in providing for the contingencies of men's circumstances, made them very common, and they were brought into frequent discussion in our courts in every period from the reign of Henry III. to that of which we are now writing.

The principal *conditional estates*, in the early times of our law, were such as had been converted into estates tail by the statute *de donis*. These had long since fallen under a different head; the supposed condition being no longer a subject of consideration. The chief estates upon condition that now appear in our books, are such as were made to secure a loan of money, and were termed *mortgages*. The others cannot easily be ranked under any particular denomination.

Estates upon condition, in a legal view of them, were of two sorts; that is, upon condition in deed, and upon condition in law. An instance of a condition in deed is, where a man infeoffed another in fee, reserving to him and his heirs a certain rent payable at a certain day, yearly; with a condition, that if the rent was behind, it should be lawful to the feoffor and his heirs to enter; in such case the feoffor might enter, and intirely oust the feoffee (*d*). Sometimes the condition was, for the feoffor to hold the land only till he was satisfied; in which case he would en-

(*a*) Litt. 72.(*b*) Ibid. 70.(*c*) Vid. ant. vol. I. 294.(*d*) Litt. 325.

ter and take the profits, as a distress ; but when he was satisfied the feoffee might re-enter (a). The words constituting such conditions were various ; as, *sub conditione quòd, &c. proviso quòd, &c. si contingat quòd, &c. tunc, &c.* (b) ; and in all these instances the feoffee had an estate upon condition.

The principal of these estates upon condition
 Mortgages. by deed was a mortgage, or *mortuum vadium* ; a security well known in the time of Glanville, who states it, however, as a hard bargain, and such as subjected the lender to the imputation and punishment of usury (c). The common way of making this security, was for the borrower to infeoff the lender in fee, upon condition that if the feoffor paid to the feoffee at a certain day such a sum, the feoffor might enter (d). Sometimes a gift in tail, or a lease for life or years, was made in mortgage (e). It was held, that should such feoffor die before the day of payment, his heirs or executors (f) might tender the money and enter, though there was no provision to that effect in the deed ; for the heir was considered as having an interest in the condition, and the grand object was, that the money should be paid at the day, which might be as well done by the heir as the feoffor : but a stranger who had no interest could not make such tender (g). If the feoffee refused the money so tendered, and the feoffor entered, the feoffee had no remedy by law to recover the money, which he lost by his own default and obstinacy (h). If the condition was for the feoffor to pay, not at *a certain day*, but *generally*, and the feoffor died before payment, this was held differently ; for, in such case, the heir could not make the tender ; because a condition for the feoffor to pay was the same as saying he should pay during his life ; and when he died, the

(a) Litt. 327. (b) Ibid. 328, 329, 330. (c) Vid. ant. vol. I. 163.
 (d) Litt. 382. (e) Ibid. 333. (f) Ibid. 337. (g) Ibid. 334.
 (h) Ibid. 335.

time of the tender was past (*a*). Many similar questions upon the performance of conditions by heirs, are to be found in Bracton (*b*). If the feoffee in mortgage died before the day of payment, the feoffor ought to pay the money to the executors, and not to the heir; the estate being given in lieu of money, which would otherwise have come to the executors. But sometimes the deed expressly stipulated that the money should be paid to the feoffee, or his heirs (*c*).

Some doubts had arisen about the place where the feoffor in mortgage was to tender the money. Some said upon the land, because the condition, it was said, depended upon the land. But Littleton was of opinion, that he was bound to seek the feoffee wheresoever he was in England; the same as if money was to be paid on a common condition in a bond; in which case the obligor was bound to seek the obligee, if in England, otherwise the obligation would be forfeited. He likewise thought that the estate might more properly be said to depend upon the condition, than the condition to depend on the land (*d*). There was this difference between a sum in gross and a rent issuing out of land, that the latter need only be tendered on the land (*e*). It was therefore adviseable and safe for the feoffor in mortgage to appoint by the deed a special place for the payment; and such was commonly the practice; as, "in the cathedral of St. Paul's church, in London, within four hours next before the hour of noon, at such a pillar within the church," and the like specifications, which ascertained to a certainty both the time and place (*f*). Though the feoffee was not bound to receive the money in any other than the place limited, yet, if he so pleased, it would equally avail the feoffor; and so it would, if the feoffee accepted any other thing in satisfaction of the money, though not a twentieth part of the value (*g*). Thus stood the law respecting mortgages in the reign of Edward IV.

(*a*) Litt. 337. (*b*) Vid. ant. vol. I. 294, 296. (*c*) Litt. 339. (*d*) Ibid. 340. (*e*) Ibid. 341. (*f*) Ibid. 342. (*g*) Ibid. 344.

97 feoffor
Where estates were to be raised or defeated by performance of a condition, it appears from the above cases, that any person who had an interest in the condition, or in the land, might make offer to perform that condition. Again, where a feoffment was upon condition, that if the feoffee paid to the feoffor at a certain day so much money, the feoffee should have the land to him and his heirs, and if he failed, the feoffee might enter; if the feoffee, before the day of payment, made a feoffment to another, and the second feoffee tendered the money, he would have the estate without the condition being so expressed: and this was, because he had an interest in the condition for the safeguard of his estate. The same if the first feoffee tendered it, because he was privy to the condition (a).

Concerning these conditions for *entry* it should be observed, that they, as well as rents, could be reserved or given to no person but only to the feoffor, or donor, and his heirs. For if a man let lands for life, rendering rent, with a clause of re-entry for non-payment, and then granted the reversion with attornment, the grantee of the reversion might distrain for the rent as incident to the reversion, but could not enter, the right of entry being gone for ever (b). In like manner, if a reversion came to a lord by escheat, the lord might distrain, but could not avail himself of a condition of re-entry (c).

It was laid down as a rule, that wherever land was granted for a term, with condition to hold in fee on paying a certain sum, it was always necessary that livery of seisin should be made upon the grant when the lessee first entered; for the fee and freehold could not pass without livery, this being one of the most established rules of the ancient law (d).

A question of law arose upon such a livery made to a termor for years, which has been debated since with great differ-

(a) Litt. 346.

(b) Ibid. 346, 347.

(c) Ibid. 348.

(d) Ibid. 349.

ence of opinion. Where land was granted to a man for term of five years, on condition that if he paid to the grantor within the first two years 40 marks, he should have the fee-simple, or otherwise should hold it only for the five years, and livery of seisin was made upon the grant; Littleton says, that the grantee, in such case, had a *fee-simple conditional*: but if he did not pay the forty marks within the two years, then the fee and freehold would be immediately adjudged in the grantor. For notwithstanding the common rule, that in feoffments upon condition the feoffor had not the freehold before his entry, yet, says he, that was confined to cases where he could lawfully enter, which he could not here; for the grantee had still a title to occupy for three years; and during that occupation if he committed waste, the grantor might have a writ of waste, which Littleton considers as another proof that the reversion was in him (a). The doubt, however, with later writers, has not been, whether the reversion was in the grantor at the end of the two years, but rather how it passed out of him during the two years, that is, how the grantee could have a fee conditional.

Those who differ from Littleton say, that as the fee-simple was to commence on a condition precedent, it could not pass till that condition was performed; and in support of this opinion, they vouch authorities in the reigns of the three Edwards and of Richard II. But the cases relied upon seem, many of them, to differ from this, in the grand circumstance which constitutes the foundation of Littleton's opinion, for it is not expressly said in any of them that livery of seisin was made; and Littleton has himself said, in the preceding section, that without livery nothing of the freehold and inheritance passed. It is therefore argued on the other side, with some shew of reason, that when the lessor made livery, as in the present case, it would not be

(a) Litt. 350, 351.

consistent, that against his own livery a freehold should remain in him; and secondly, it being a rule of law, that livery must pass a present freehold to some person, and cannot give a freehold *in futuro*, therefore the freehold and inheritance must pass immediately, and not expect till the condition was performed. These were principles well known in the time of Littleton; and his commentator declares that there is both reason and authority on his side (a). Upon the shifting of the freehold and inheritance on conditions and contingencies, Bracton had been very explicit, as we have shewn in the former part of this work (b).

If, by the act of God, a condition was rendered impossible to be performed, the law permitted the party to acquit himself by acting as nearly as could be according to the spirit and design of it. Thus, if a feoffment was made on condition that the feoffee should give the land back to the feoffor and his wife, and the heirs of their two bodies, with remainder to the right heirs of the feoffor; there, if the husband died in the life-time of the wife, before any estate in tail was made, he might fulfil the condition by making an estate as much like the other as possible; which Littleton thinks he would do by giving the wife an estate for life without impeachment of waste, with remainder, after her decease, to the heirs of the body of the husband, remainder to the right heirs of the husband; for as she could not have an estate in tail, it was reasonable she should at least have an estate without impeachment of waste, which was one advantageous property of an entail (c). If the husband and wife both died, leaving issue before the gift was made, then our author thought an estate should be made to the issue, and to the heirs of the body of his father and mother, remainder to the right heirs of the father (d). Again, if there was a condition to infeoff several persons to them and their heirs, and they have all died before

(a) 1 Inst. 217. (b) Vid. ant. vol. I. 296. (c) Litt. 352. (d) Ibid. 353.

the estate was made, then an estate should be made to the heir of him that survived of them, *habendum* to him and the heirs of the survivor (*a*); for this would keep the land in the line for which it was intended: whereas if the limitation had been to the heirs of the son, then it might, upon failure of heirs on the part of his father, go to those *ex parte maternâ* (*b*).

If the feoffee did any thing that affected the land, and disabled himself from making as good and complete an estate as when he was infeoffed, the feoffor might enter. As if a feoffee, before the performance of the condition, infeoffed another, or made an estate for life or years to another (*c*); if he married before the condition performed (for his wife became intitled to dower out of the land, whether he made the estate or not) (*d*); if he charged the land with a rent, or bound himself in a statute, the feoffor might enter: nevertheless, when the feoffor entered, all incumbrances and charges made by the feoffee were defeated and void (*e*).

The last order of estates upon condition in deed, now in use, was where a restraint was imposed on the feoffee with regard to alienation, or any other circumstance. In the early ages of our law, a feoffor considered a grant so much in the light of a gratuity, that he subjected it to almost any sort of restraint and condition, which did not tend to the evident breach of some law. With respect to alienation, it was very common, in the clause of permission to alien, to add, *exceptis viris religiosis et Judæis*; and when a clause was necessary to enable the feoffee to alien, it was not remarkable that it should be given with certain restrictions (*f*). It was not uncommon to add a prohibition from aliening at all, and very frequent to impose a fine for alienation. These and many other checks were thought to be lawful and reasonable for feoffors to affix to their grants, in considera-

(*a*) Litt. 354. (*b*) 1 Inst. 220. b. (*c*) Litt. 355, 356. (*d*) Ibid. 357. (*e*) Ibid. 358. (*f*) Vid. ant. vol. I. 291.

tion of the possibility of reverter, which the law supposed to remain in them after their feoffment: but the statute *quia emptores* took away the force of this reason; as since that act nothing remained in the feoffor, after a feoffment in fee. We find it accordingly laid down by Littleton, that a feoffment in fee, upon condition that the feoffee should not alien, was void in law; for the law annexing to the tenant in fee the power of alienation, it would never endure a condition that was to take away all the power it gave (*a*). But it was still held, that a partial restraint might still be imposed; as, that the feoffee in fee should not alien to a particular person (*b*).

Such conditions were good, when calculated not to defeat, but rather to favour, the great designs of the law. Thus restraints on alienation carried a more plausible colour, when connected with estates tail, the law having pronounced that those should be maintained in the form which was given to them by the donor. If therefore land was given in tail, on condition that none of the tenants in tail should alien in fee, in tail, or for the life of another, but only for their own lives; this was adjudged a good condition, because such alienation and discontinuance would be contrary to the will of the donor (*c*). Again, a gift in tail might be made upon condition, that if the tenant in tail or his heirs aliened in fee, in tail, or for term of another man's life, and also if all the issue of the tenant failed, then it should be lawful for the donor and his heirs to enter. Such conditions were held to be good, so as not to defeat, but to save the entail to the reversioner; that being the course in which the law would otherwise dispose of the land (*d*). We have before seen, that such conditions for preserving entails, were sometimes carried further than the judges thought proper to support them (*e*).

(*a*) Litt. 360.

(*b*) Ibid. 361.

(*c*) Ibid. 362.

(*d*) Ibid. 364.

(*e*) Vid. ant. 324.

Thus far of estates upon condition by deed : estates held upon condition in law might, in the full extent of the term, include most estates in the law, as there was hardly a holding that did not bind the tenant to certain terms, which might be said to be the conditions on which he held his estate. Thus, if a parkership was granted for life, there was a condition in law annexed to such office, that the parker should do his duty, or otherwise the grantor might oust him (a). There were many instances of that kind, which can very easily be supplied by the imagination of the reader.

All the different estates beforementioned might belong to more persons than one ; and when an estate was so possessed, the owners were either *parceners*, *jointenants*, or *tenants in common*. The nature of such tenancies has not hitherto been sufficiently discussed ; but they were now become too important an article to be passed over. We shall begin with *parceners*.

These were, when daughters or other female heirs took an estate in fee or in tail by descent ; and in such case they were all reckoned but as one heir. As some might feel an inconvenience in possessing land in this way, the law had furnished a writ *de partitione faciendâ*, which we find mentioned so early as the time of Bracton as a judicial proceeding, by which one or more *parceners* might compel the others to come into a partition of the estate amongst them (b). A partition was sometimes made by deed or by parole (c), with the general consent of all the parties. Thus, either some friends would divide the land as nearly in equality as could be, and the eldest made the first choice ; or it would be agreed between them, that each should have certain particular tenements (d). In these cases, the part the eldest sister had used to be called, by

(a) Litt. 387.

(b) Vid. ant. vol. I. 312.

(c) Litt. 250.

(d) Ibid. 243, 244.

way of distinction, the *enitia pars*. If the eldest sister made the partition, it was thought a reasonable piece of equity that she should chuse last, *cujus est divisio, alterius est electio*. Another voluntary partition was by lot: they used to write upon separate scrolls different parts of the land, and these being rolled up in wax, and mixt together, the eldest sister drew the first ball, and then the others (a). If they could come to no agreement about either of these amicable methods, they then had recourse to the compulsory one, by writ *de partitione faciendâ* (b).

The judgment upon this writ was, that partition should be made between the parties, and that the sheriff should go in person to the land, and, by the oaths of twelve men of his bailiwick, make partition, assigning a part to each parcener: no mention was to be made in this judgment of any preference to the eldest sister beyond the others (c); but it was left wholly to the sheriff to assign as he pleased; and he was to certify the partition to the justices (d).

A partition need not be made between all the parceners; for if there were three parceners, and the youngest would have partition, and the other two would rather hold in parcenary, then one part might be allotted in severalty to the one who wished it. But this was in case of partition by agreement only; for on a writ, there must be a partition of the whole (e).

Whether partition was made by the sheriff under the sanction of law, or by the parties upon an agreement, the great object of both was to obtain an equality; and therefore, when property was circumstanced in a particular way, there was some difficulty so to marshal it, that every claimant might have a lawful equality. For instance, if two houses descended to two parceners, the one producing twenty shillings, the other ten shillings rent *per ann.* partition might be made in this manner: Each parcener

(a) Litt. 246.

(b) Ibid. 247.

(c) Ibid. 248.

(d) Ibid. 249.

(e) Ibid. 276.

might have a house, and she who had that worth twenty shillings *per annum*, would be required to pay a yearly rent of five shillings issuing out of her house to the other parcener and her heirs (a). This, though without deed, being a rent charge, might be distrained for, into whatsoever hands the land went (b).

If a partition was made between tenants in fee, and it was found afterwards to be unequal, it was, nevertheless, binding on all parties; but not so between tenants in tail; for though they were bound during their lives, yet the issue of either might disagree to the partition, and enter upon the land, and occupy the whole in common as if no partition had been made (c). In like manner, if a partition was made by a parcener's husband, she might enter after his death (d). The same of a parcener within age, who might enter either before or after she came of age; but if, when of full age, she took all the profits of her allotment, this would be construed such an agreement as would confirm the partition (e).

The statute *de donis* created some difficulties in the way of partitions. Thus, if lands descended to two daughters in fee and in tail, and, upon a partition, one took the lands in tail, and the other those in fee; if she who took the land in fee aliened it, and then died leaving issue, the issue might enter into the lands in tail, and hold them in purparty with the aunt (f).

There was a species of estates-tail that created still greater difficulties in making partitions, and these were estates in *frank-marriage*. If a man was seised in fee, and had two daughters, and on the marriage of the eldest he gave lands in *frank-marriage*, and afterwards died seised of lands of greater value than those given in *frank-marriage*; it was a rule, in such case, that neither the husband nor wife should have any purparty in such remnant of the estate,

(a) Litt. 251. (b) Ibid. 252, 253. (c) Ibid. 255. (d) Ibid. 256.

(e) Ibid. 258.

(f) Ibid. 260, 261.

unless they would put their lands held in frank-marriage into what was called *hotchpot* with the remnant, and so make an equal division of both together: if she would not agree to this, then the youngest might hold the remnant to her separate use (*a*). A gift in frank-marriage being an advancement to a child, it was collected from such refusal to put into hotchpot, that she was conscious she was sufficiently advanced; and therefore it was but reasonable, that she should have no claim on what remained for the other child (*b*). This law of *hotchpot* held only where the lands descended from the donor; and it did not take place if they came from any ancestor of his (*c*); nor where the lands in frank-marriage and the others were of equal value (*d*); nor in any case where lands did not descend in fee-simple (*e*): all donees but those in frank-marriage might have their purparty in such descended land without coming into hotchpot (*f*).

It was a rule, that should one of the parceners be evicted of her part by one who had lawful title, she might have a claim upon the other allotments, as if no partition had been made (*g*). Thus, if land, part of which was possessed by just title, and part acquired by disseisin, descended on two parceners; and the disseisee being an infant, and so not barred of his entry by the descent, entered on the parcener to whom the land of which he had been disseised was assigned, then she might enter upon her sister, and hold her share in parcenary with her. But if she had aliened the land in fee, and the infant had entered on the alienee, it was held, the parcener could not then enter on her co-parcener; but she might, if she aliened only a particular estate, and continued seised of the reversion (*h*). If one parcener aliened, the others might have a writ of partition against the alienee (*i*).

(*a*) Litt. 266, 267, 268. (*b*) Ibid. 269. (*c*) Ibid. 272. (*d*) Ibid. 273.
(*e*) Ibid. 274. (*f*) Ibid. 275. (*g*) Ibid. 263. (*h*) Ibid. 262. (*i*) Ibid. 264.

Thus stood the law concerning parceners. Parceners were usually females; none but females being able to take an estate together, by the general law of the kingdom. But by the custom of gavelkind, males might hold lands in parcenary; the descent there being to all the males equally (a).

The condition of *jointenants* bore some apparent affinity to that of parceners, but there was a material difference between them. The first difference was, that jointenants took their estate by purchase, and not by descent (b). Again, the nature of jointenancy was, that the surviving tenant should have the intire estate to himself. Thus, if three were infeoffed in fee, and two had issue and died, yet the third would take the whole. But it was different with parceners; for if there were three parceners, and one died leaving issue, that issue took the part belonging to the parcener; and if she died without issue, her coheirs would take her part as parceners, and not as jointenants (c). It was not only among jointenants of estates of freehold that survivorship prevailed, but it held also between those who had a joint estate or possession of a chattel, real or personal; as of a lease for years, or of a horse (d): the same of a debt or duty; for if an obligation was made to many, the survivor would have the whole debt: the same of other covenants and contracts (e). But this did not extend to merchants; for it was laid down by our law, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (f).

An estate was sometimes so limited, that the feoffees were jointenants for their lives, and tenants in common of the inheritance. As where lands were given to two men and to the heirs of their two bodies begotten; in this case, the donees had a joint estate for their lives, and yet

(a) Litt. 265.

(b) Ibid. 277.

(c) Ibid. 280.

(d) Ibid. 281.

(e) Ibid. 282.

(f) 1 Inst. 182.

they had several inheritances; for if one of the donees had issue and died, the other would have the whole by survivorship for his life; and if the survivor had likewise issue and died, then the issue of one would have the one moiety, and the issue of the other the other moiety, and they would hold them in common. For the former words gave a complete estate to the donees for their joint lives; and as they could not by possibility have an heir between them, the law gave them such an inheritance as they could take; namely, to the heirs which each should respectively beget in marriage: the inheritances, therefore, must of necessity be several, without any survivorship between the issue (a). Again, if lands were given to two and to the heirs of one, they were jointenants for life, and one of them had the fee-simple; and if he who had the fee-simple died, the other tenant had the intirety by survivorship (b).

The title of survivorship superseded all charges and incumbrances made by the jointenant: thus, a rent charge granted by a jointenant would be good during his life, but void as against the other jointenant. It was otherwise in case of a parcener; because the surviving parcener took by descent from the parcener who died, which the jointenant did not (c). If a jointenant could not encumber the estate, so neither could he devise it; but a parcener could devise her moiety (d). The survivorship was a title paramount to every thing that the jointenant could do; the whole estate was considered as belonging to each, and therefore it would be disposing of the property of others, for one to have prevented its coming to the longest liver in as perfect a state as when the gift was originally made to them. It is upon this idea that jointenants were said to be seised *per my, et per tout*; or, as Littleton more fully expresses it, "In every parcel, and by every parcel, and by all the lands and tenements is one tenant jointly seised

(a) Litt. 283.

(b) Ibid. 285.

(c) Ibid. 286.

(d) Ibid. 287.

“with his companion (a).” So great a favourite was this joint estate in the law, that though it might be parted by the agreement of the jointenants, yet there was no writ to compel a partition as between parceners (b). Notwithstanding the above piece of law, upon a rent charge granted by a jointenant, if a lease was made by a jointenant who died before the lessee entered, the lessee might, notwithstanding, enter; and the reason of this difference is stated by Littleton to be, because the tenant had a right in the land by force of the lease, and therefore the state of the land was altered in the life of the tenant, which was not the case in the rent charge (c). If land was given to a husband and wife, and another person, the husband and wife took only half, because they are reckoned but one person in law (d).

The title of parceners, as was before seen, accrued only by descent; that of jointenants, by purchase; but tenants in common might be by both titles; and tenants of both the above descriptions might become tenants in common. Tenants in common were such as came to lands by several titles, but held them in common *pro* Tenants in common. *indiviso*, so that neither knew the part that belonged to him. Thus a jointenancy might become a tenancy in common; as if one jointenant aliened in fee to another, such feoffee would hold in common with the other jointenants, because he took his estate by a different title from that of the jointenant with whom he held (e); but if the jointenants were more than two, those who had not aliened, held their part jointly with the usual survivorship (f). If an estate was given to two persons, without more saying, the construction of law upon it was, that they were jointenants; but if it was to two abbots, or to an abbot and a secular man, and

(a) Litt. 288.

(b) Ibid. 290.

(c) Ibid. 289.

(d) Ibid. 291.

(e) Ibid. 292.

(f) Ibid. 294.

the like, this was held to be a tenancy in common (*a*). If land was given to two to hold, the one moiety to one and his heirs, the other moiety to the other and his heirs, it was a tenancy in common (*b*). The same if a man infeoffed another of the moiety of his land, the feoffee and feoffor held in common (*c*).

If there were two jointenants in fee, and one let the part that belonged to him for the term of his life, it was held, that in such case the reversion was severed, and the lessor held in common with the other jointenant (*d*), according to the opinion of Littleton, though some thought otherwise. Again, if there were three jointenants, and one released all his right to another of them; the person to whom the release was made, would hold such third part with his companions in common (*e*). If one parcener aliened to a stranger (*f*), the alienee would hold in common with the other parceners.

The different condition of jointenants and tenants in common occasioned a difference in the actions they brought; they were sometimes to be joint, and sometimes several. In like manner, tenants in common in some cases might join, and in some were driven to bring several actions. For example; if two tenants in common were disseised, they must have two assises, because they were seised by several titles; but it was otherwise of jointenants, who, on account of their joint title, must join in one assise (*g*). The heirs of two parceners, though they came in by several titles, would, notwithstanding, be intitled to one assise, as long as the land remained undivided (*h*). Where two tenants in common let their land, reserving a certain rent, and a pound of pepper, and a hawk, or a horse; if they distrained for this, and the tenant made a rescous; in such case, as to the rent and pound of pepper, they might have two several

(*a*) Litt. 296, 297. (*b*) Ibid. 298. (*c*) Ibid. 299. (*d*) Ibid. 302.
 (*e*) Ibid. 334. (*f*) Ibid. 309. (*g*) Ibid. 311. (*h*) Ibid. 313.

assises; but as to the hawk or horse, they could have only one. The reason of this difference, as given by Littleton, is, that the rent and pound of pepper might be apportioned to each according to his moieties; but as no moiety of a hawk or horse could be had, therefore, notwithstanding their several titles, they could have but one assise of such things (*a*).

Though tenants in common were properly to have several actions of such things as concerned the realty, on account of their title to the realty being several, yet in personal actions they might join; as of trespass, for breaking their houses, breaking their closes, feeding and spoiling their grass, cutting their woods, fishing in their piscary, and the like (*b*). In like manner they might bring a joint action of debt for rent, because it was in the personalty; but if they avowed for the rent, they ought to sever, because it was in the realty (*c*). Tenants in common might make partition by agreement; but they could not be compelled by law to do it (*d*).

As persons might be tenants in common of a freehold, so might they of a chattel, whether real or personal; and in a similar way might one jointenant of a chattel make the person to whom he aliened his moiety, tenant in common with the other jointenant (*e*). One tenant in common of a term for years might have an *ejectione firmæ* against the other; so might a guardian have an ejectment of ward for lands held in common; these being things that might be apportioned and severed. But one tenant in common could not have trespass *quasi clausum fregit* against the other, because, by the nature of their estate, each might enter and occupy *per my et per tout*. And in chattels personal, if one tenant in common took the whole, there was no remedy in law for the other; but he must retake it, if he could.

(*a*) Litt. 314.(*b*) Ibid. 315.(*c*) Ibid. 316, 317.(*d*) Ibid. 318.(*e*) Ibid. 319, 320, 321.

The same of chattels real, that could not be severed; as the wardship of the body (though we have seen it was otherwise of the land), where the one guardian could only take the body out of the possession of the other, when he saw a fit time (a).

Next to the nature of estates, we are led to consider the modes by which they were created and conveyed. The most ancient ways of conveyance were by feoffment, and by fine, both which have been frequently mentioned. Deeds of release and of confirmation had lately become more common; and the discussion of their design and effect filled some space in the learning of real property.

A person might convey all the right he had in lands or tenements by a *release*, the form of which was, *Noverint universi, &c. me remisisse, relaxasse, et omninò de me et hæredibus meis quietum clamasse totum jus, titulum, et clameum, quæ habui et habeo* (b). We are told by Littleton, that some releases went further, and added, *quæ quovismodo in futurum habere potero*; but these words, says that author, were null and void; for no right passed by a release, but that which the releasor had at the time. Thus, where there were father and son, and the father was disseised, and the son, during the father's life, released by deed to the disseisor all the right he had or might have without clause of warranty, and then the father died, the son might enter, notwithstanding the release; because he had nothing in the land during his father's life, but the right descended to him after the release (c).

In cases of release of all a man's right in lands, the lessee should have a freehold in deed or in law, to make the release good (d). Thus the son of the disseisor had a freehold in law by the descent without an entry, and a release

(a) Litt. 323. (b) Ibid. 445. (c) Ibid. 446. Vid. ant. vol. I. 291.

(d) Ibid. 447.

so made to him would be good (*a*). In some cases, where there was no freehold either in deed or in law, as where the disseisor let the lands for life, with reversion to himself, a release to the disseisor would be good, by reason of the reversion (*b*). So if there were remainders over, a release to any of the remainder-men was good (*c*). But if the tenant for life was disseised, a release to a remainder-man would be void, because he had not a remainder in deed, but only a right to a remainder (*d*). Every release that was good to a reversioner, or remainder-man, was good to the freeholder (*e*); and so *vice versâ* of a release to the freeholder (*f*).

The form of a deed of confirmation was this: *Ratificâsse, approbâsse, et confirmâsse, &c.* A release and a confirmation differed in many respects. As for instance: If a man let lands for life, and the tenant for life let them for forty years, and the first lessor confirmed the estate of the tenant for years, and afterwards the tenant for life died during the term for years, the first lessor could not enter (*g*). But a release by the first lessor to the tenant for years would in this case be void, because there was no privity between him and the tenant for years; for it was a rule, that a release to a tenant for years was not good, unless there was a privity between him and the releasor (*h*). Thus if the disseisor made a lease for years and the disseisee released to the termor, it would be void, but a confirmation would be good (*i*). If the disseisor confirmed the estate of the disseisee, he had a clear fee-simple, although the confirmation was expressed to be in tail, for life, or for only an hour (*k*). A confirmation to a tenant for life would not, like a release, avail the remainder-man or reversioner; but a confirmation to the remainder-man would bar the confirmor from entering on the tenant for life; because such entry, by defeating the

(*a*) Litt. 448. (*b*) Ibid. 449. (*c*) Ibid. 450. (*d*) Ibid. 451.
 (*e*) Ibid. 452. (*f*) Ibid. 453. (*g*) Ibid. 516. (*h*) Ibid. 517.
 (*i*) Ibid. 518. (*k*) Ibid. 519, 520.

estate for life, would also defeat the remainder, against his own confirmation (a).

If there were two disseisors, and a release was made to one of them, such releesee might hold his companion out. But according to some opinions, a confirmation would not have the same effect; for nothing was confirmed but *his estate*, and that was a joint one (b). The same if one jointenant confirmed the estate of the other; but if in such case the following words were added, "to have and to hold" "to him and to his heirs all the tenements, &c." it would become a sole estate in fee-simple. It is therefore recommended by Littleton, that instead of confirming *the estate*, the words should be, "to have the said land to him and his heirs," or for life, as the case might be; applying the words of confirmation not to the estate, but to the land (c).

Sometimes the words *dedi* or *concessi* had the same force as *confirmavi*; as if the disseisee made a deed to the disseisor, saying *dedi et concessi* the land in question, this would operate without livery, as a confirmation (d). So if a man was in possession under a lease for years, and a deed was made to him by the words *dedi* or *concessi* for life, in tail, or in fee, it would enure by force of the confirmation to enlarge his estate (e). Where the words *dedi et concessi* would not enure as a confirmation, they might as a new grant; as where the person to whom the deed was made had nothing in the thing on which the confirmation would enure (f). Sometimes such grant operated in extinguishment of the thing given or granted; as where a tenant held of his lord by certain rent, and the lord by deed granted to the tenant and his heirs the rent, the rent thereby became extinct (g).

In like manner a release was sometimes construed to enure to enlarge an estate, and sometimes *de mitter*, and

(a) Litt. 521. (b) Ibid. 523. (c) Ibid. 524. (d) Ibid. 531.
(e) Ibid. 532, 533. (f) Ibid. 541, 542. (g) Ibid. 543.

vest a right according to the fact and circumstances of the case. Thus if a reversioner released to his tenant for a term, he must specify the estate he meant to give, whether for life, in tail, or in fee; and if there was no mention of heirs, the estate was enlarged only for life (*a*). But if a disseisee released all his right to the disseisor, as this was nothing more than *remitting* the right of the disseisee, there needed no mention of heirs; for the releesee had a fee-simple at the time of the release made, and that which was before wrongful was thus made lawful; and if the release was to him only for an hour, it would enure in fee; for a right being once gone, was gone for ever (*b*). A release was said also to enure by way of extinguishment, where he to whom the release was made could not take the thing released; as where a lord released to a tenant all the right he had in the seignory, or the land: the same of a release to the tenant of the land of a rent charge, or common of pasture (*c*).

A confirmation, as the name implies, was designed to substantiate a defeasible estate, which had been obtained either by right or by wrong; and therefore it was rarely, if ever, made in concurrence with the party who gave rise to the imperfect interest which it was meant to confirm. But a *release*, though applicable to divers cases, where it was certainly a subsequent transaction, and made upon an after-thought, as to divest a right, or enlarge some pre-existent estate; yet was not unusually adopted as an original conveyance, for the transfer of the freehold and inheritance. The way was this: A deed of *lease* was made to the party intended to be the purchasor for three or four years; and when he had entered on the possession, immediately, or very soon after, a *release* of the inheritance was given to him; and thus he became seised as completely as if by fine, or feoffment with livery of seisin (*d*). Thus a *lease and release*

(*a*) Litt. 465. (*b*) Ibid. 466, 467. (*c*) Ibid. 479, 480. (*d*) 32 Hen. VI. 8.

were practised as a full transfer of the freehold and inheritance. This, as well as a feoffment to a use, which will be considered presently, was a deviation from the common-law conveyances, which, we shall soon find, began to give place to these and other new modes of transfer, grounded upon the doctrine of uses.

In considering the nature of conveyances at this time, we must not forget to speak of *attornment*, which was a necessary requisite for the completion of some grants that were particularly circumstanced. Attornment was the agreement of the tenant to a grant of a seignory, or of a rent; or the agreement of a donee in tail, or termor for life, or for years, to a grant of the reversion or remainder. In the time of Henry III. (a) we had occasion to mention this, among other topics arising upon the subject of tenures, but since that time great alterations had taken place in it. What was there said, is confined to attornment of the former kind, namely, upon a grant of the lord; which doctrine, however, appears in a very different point of view, as exhibited by Littleton. As this subject leads us to consider very particularly the relation between lord and tenant, it is well worthy of attention. We shall therefore take a short view of it; and shall begin with grants made by lords, and then proceed to grants made of reversions and remainders.

If a lord granted by deed the services of his tenant, the tenant must attorn during the life of the grantor, or the grant would be void. The form of attornment was either by saying "I agree to the grant made to you," or "I am content with the grant made to you;" or, as were the most common forms, "I attorn to you by force of the said grant," or "I become your tenant;" or by delivering to the grantee a penny, or any thing, by way of attornment (b). So much did the validity of such a grant depend on the attornment, that if the lord made a second grant, and the

(a) Vid. ant. vol. I. 282.

(b) Litt. 551.

tenant first attorned to the second grantee, he would have the services, and any attornment afterwards to the first grantee would be void (*a*). If a manor was sold, it was necessary all the tenants should attorn, except those at will, for they need not (*b*). If any tenant had made a lease for life, or in tail, saving the reversion, the reversioner was to attorn, and not the tenant for life, or in tail, for they were not immediately privy to the grantor (*c*). So in case of lord, mesne, and tenant, the mesne should attorn to a grant of the services by the lord, and not the tenant *peravaile* (*d*). But it was otherwise when the grantee of a rent charge, or rent seck, granted it over, for then the tenant of the freehold, on which the rent was charged, was to attorn; for the avowry was not to be made on any person, but as in lands charged with the distress (*e*). So where lands were let for life, with remainder over in fee, and the lord granted the services, it was sufficient if the tenant for life attorned; for he in remainder could not be said to be tenant to the lord to this purpose, till after the death of the tenant for life. Yet if such remainder-man died without heir, the lord would have the remainder by escheat (*f*).

Thus far of attornment, where it was necessary to complete a grant of services, or of rent. We have before said, that it was also necessary where land was let for years, for life, or in tail, and the reversion was granted either for life, in tail, or in fee; for in such cases it was requisite that the tenant for years should attorn to the grantee in the life of the grantor; and by such attornment the freehold would pass without any livery of seisin (*g*). In like manner, if land was let in tail, or for life, with remainder over in fee, the remainder over could not be granted without the attornment of the tenant of the land (*h*). Where

(*a*) Litt. 552. (*b*) Ibid. 553. (*c*) Ibid. 554. (*d*) Ibid. 555.
(*e*) Ibid. 556. (*f*) Ibid. 557. (*g*) Ibid. 567, 568. (*h*) Ibid. 569.

land was let for years, remainder to another for life, reserving a rent to the lessor, and livery of seisin was made to the tenant for years; if the reversion was granted, and the tenant for life attorned, the grantee by force of such attornment might distrain the tenant for years for rent due after such attornment; for where a reversion depended upon an estate of freehold, the attornment of the freeholder was sufficient (*a*).

We have hitherto been speaking of a grant by deed: there was some difference where the grant was made by fine. For if the lord granted his services by fine, they were immediately in the grantee by force of the fine, but yet the lord could not distrain for them without attornment. However, if the tenant died, leaving an heir within age, the grantee would have the wardship, the seignory being in him by the fine without attornment: the same of an escheat (*b*). So if a reversion dependent on an estate for life was granted by fine, the reversion was immediately in the grantee by force of the fine, but he could have no action of waste without attornment; yet if the tenant for life aliened in fee, the grantee might enter, such alienation being to his disherison, as he had the reversion (*c*). The lord in the above case could not have relief without attornment, because this was a matter that lay in distress, and he could not avow the taking to be good and lawful, as was before observed, without attornment. To establish wardship, or escheat, there needed no distress, but an entry, which he had by force of the fine (*d*). So if there were lord, mesne, and tenant, and the mesne made a grant of the services of his tenant, and then the grantee died without heir, the services of the mesnalty would escheat to the lord paramount, and he might distrain for them, notwithstanding there had been no attornment; and this for two reasons, given by Littleton: First, because the mesnalty was in the grantee by force of the

(*a*) Litt. 571.

(*b*) Ibid. 579.

(*c*) Ibid. 580, 581.

(*d*) Ibid. 582.

fine, and so, being very tenant to the lord paramount, he might avow upon him, though he was not compelled so to do; and if the grantor had died without heir, during the life of the grantee, he would have been compelled to avow upon the grantee: Secondly, because the lord paramount claimed the mesnalty not by force of the grant by fine, but by virtue of the seigniorie paramount (*a*).

In like manner, for a similar reason, if a reversion dependent on an estate for life was granted by fine, and the grantee died without heir, the lord would have the reversion by escheat, and also a writ of waste, notwithstanding there was no attornment; but where a person claimed by force of a grant by fine, as heir, or assignee, he could not distrain, nor avow, nor have waste without attornment (*b*).

This doctrine of attornment did not reach to devises; for if a rent service, or rent charge, was devised by will, the devisee might distrain without attornment (*c*), and the devisee of a reversion might have waste without attornment. The reason stated by Littleton is, that the will of the testator should be performed; whereas it might be defeated, if made dependent on the attornment (*d*).

Thus far of attornment to complete conveyances that were lawful; but if a grant and fine stood in need of this assent of the tenant to perfect the transfer of the land, much more should an unlawful act, as a disseisin, intrusion, or abatement. Thus it is laid down by Littleton, that if the tenants of a manor did not attorn to the disseisor, then, though he died seised, and his heir was in by descent, yet might the disseisee distrain for the services, because all the manor did not descend to the heir (*e*).

The reader has been before reminded that a recovery on a *præcipe* had continued to be a mode of conveyance; and the decision in Taltarum's case, as it gave additional effect to this proceeding, contributed

Feigned recoveries.

(*a*) Lit. 583.

(*b*) Ibid. 584.

(*c*) Ibid. 585.

(*d*) Ibid. 586.

(*e*) Ibid. 587.

to make it more generally useful. A recovery thenceforward became established as a common assurance of estates, and began to partake of that high credit and authority which had long been attributed to a fine.

A person who was seised of a clear fee-simple might convey his estate by a recovery; and by later opinions, confirmed by Taltarum's case, the same may be said of a tenant in tail. What persons, by reason of the narrowness of their estate, could not convey by recovery; what circumstances were necessary towards making the recovery complete and effectual; and how a recovery suffered by such persons, or without such circumstances, might be avoided; is an inquiry that will best discover the nature of a recovery as a conveyance.

A feigned recovery, like all other judgments, might be examined in a writ of error or attain. But the more common way was to *falsify the recovery* (as it was called) by another action, sometimes grounded on an entry, and sometimes not, as the case might be, or by a plea to any action founded upon the recovery. Thus, if the claimant's entry was not taken away by the recovery, he might bring an assise; and when the recovery was pleaded against him, he might reply such matter as would avoid the recovery: the same if his entry was taken away, and he brought a *præcipe*, and the recovery was pleaded. Some special actions were given in certain cases; as a *quòd ei deforceat*, for a particular tenant, deceit for want of summons, and some others. Another way of falsifying was by plea; as where an action was founded upon a recovery, and the tenant pleaded matter to avoid the recovery.

The grounds upon which a recovery might be falsified were various. Thus, if a recovery was pleaded, it might be replied, that at the time of the writ brought the tenant was not tenant of the freehold, nor at any time since (a). This plea of no tenant to the *præcipe*, was the

(a) 12 Ed. IV. 14. 19. and 13 Ed. IV. 1.

most common. Another ground was covin; as if the entry of one who had right to the land was taken away, and he got another to enter covinously, and then recovered against the person so entering; this might be falsified, though the party recovering had good title. Thus, where a woman had title of dower and got another to enter, and then she recovered against him that entered, this might be falsified for the covin (*a*).

It seems to have been laid down as a general rule, that no party or privy to a recovery should falsify in the point tried by verdict. Thus, on an issue of *non dedit*, if a verdict was found against a tenant in tail, this being a decision of the title, neither he nor his issue would be permitted to falsify, but they must resort to an attain: otherwise, if the issue had been upon a collateral point, and not upon the title; or if the recovery had been by default (*b*). Yet, notwithstanding this rule, where the party could not have an attain, he might in some cases falsify in the point tried: for it was laid down, that where a man seised in Borough-English lost by false oath, as the attain belonged only to the heir at common law, the younger should be permitted to falsify in the point tried (*c*). Though this restriction was laid on parties and privies on account of their being in most cases intitled to another remedy, either by writ of error or attain, yet a stranger, who had not such remedy, was allowed to falsify in the point tried, or allege any matter which would prove the recovery, or the title of the demandant, to be void (*d*). Thus a recovery, with all the sanction of a judicial proceeding, and of a record, was subject, like other conveyances of estates, to be canvassed, and made void, if irregular, or if suffered by persons who had no title, or not such an estate of inheritance as was by law completely in their disposal.

(*a*) 9 Hen. VI. 41. (*b*) 34 Hen. VI. 2. 19 Hen. VI. 39. (*c*) 22 Hen. VI. 28. 26 Hen. VI. 18. (*d*) 36 Hen. VI. 32.

Of uses.

The most novel mode of conveyance was a feoffment to a use. We have already taken notice of the origin of uses, in speaking of the several statutes that were passed for correcting the inconveniencies suffered from this new species of property. Notwithstanding the distance of time since those statutes were made, there appears nothing in our books relating to *uses*, till the reign of Henry VI. Though it is probable that a *proper use* was meant even by the stat. 50 Ed. III. and it is certain, this property was well known in the reign of Richard II. and Henry IV. yet it is pretty clear, that *uses* were not carried to any great extent, till the foreign wars of Henry V. and the civil dissensions between the Houses of York and Lancaster made it necessary to find out some method of conveying and concealing real property from the reach of debts and forfeitures. The expences and attainders which then threatened the nobility, made them resort to uses, as the most convenient method of sheltering their lands from the consequences of both.

We have now sufficient lights to enable us to trace the steps by which *uses* gradually arose, and took the form in which they afterwards appeared. As low down as the 7th of Henry VI. this kind of property was so little regarded, that we find it stated by one of the judges as a thing not allowed by law, and intirely void, if a man made a feoffment with a proviso, that he himself should take the profits (a). It was not till the 33d year of the same reign, that judicial opinions seem to have altered in favour of these feoffments; and then, upon a question of collusive feoffment to the heir to avoid guardianship; where it was agreed by the bench, that a feoffment to the heir and a stranger, and to the heirs of the heir, was lawful, and no collusion, on account of the interest of a stranger. Again, where a feoffment was to the son to enable him to marry his daughter,

(a) 7 Hen. VI. 43. b.

or to pay debts (a); in both these cases it was agreed, that a subpoena lay against the feoffees to compel them to perform the trusts; but it was held, if the feoffees in either of these cases infeoffed another person, there was no remedy against the second feoffee.

In the 37th year of this king there is a case which sets forth the state and application of *uses*, and the course they were then in of being enforced in chancery. A man had signified his desire that his feoffees should make a feoffment to a person to whom he had sold the land; and it was agreed in the exchequer-chamber, whither the cause had been adjourned, first, that the intention of the feoffor should be declared by some writing, and not by a verbal message; secondly, that where one devised by his will, that his feoffees should make an estate for life to one, remainder to another, the remainder-man should have a subpoena to establish his estate, even in the life of the tenant for life. In the 4th year of Edward IV. (b) this kind of property is thus spoken of in the very language and terms which have ever since been applied to it: *A.* infeoffs *B.* to the use of *A.*; here *B.* is seised of the land to the use of *A.* who only infeoffed him upon trust and confidence: upon which several rights the court thus explains itself: “ In the chancery, a man shall have his remedy according to the intention of the feoffment, and according to conscience; but in the common-pleas, and in the king’s bench, according to the course of the common law it is otherwise; for the feoffee shall have the land, and the feoffor shall have nothing against his own feoffment, though it was only upon confidence.”

It appears from hence, that the judges had qualified their notions concerning this new subject of property, since the beginning of the reign of Henry VI. when the strict opinion before-mentioned was delivered. Uses had now

(a) 33 Hen. VI. 14. Bro. Garde, 5.

(b) 4 Edw. IV. 8.

been very well considered, and their properties and incidents recognised. So completely was a *use* considered as separated from the land, that in this same year (*a*) it was declared, that a feoffment without any intent expressed, or if expressed to be to the feoffor and his heirs, should always be construed as made to the use of the feoffor's will, and that he might alter it whenever he pleased; except where it was declared to the use of a stranger, or the intent was to take back an estate tail; for in these cases the interest of a third person was concerned, and it would not have been consistent with conscience to defeat it by any subsequent alteration.

Their nature
and properties. In many respects the properties of a use were settled in analogy to the law respecting land. It was to descend as the land would: thus it went to the younger son in Borough-English. If one seised *ex parte maternâ*, or seised in tail, with remainder over, infeoffed one to a use, the use descended as the land would have done; but it was not so of land held in right of the wife (*b*). There was a *possessio fratris* of a use (*c*). But where the *cestui que use* was attainted, and died without a will, the lord was not intitled to the use, nor was the heir; and it was thought it should belong to the feoffees (*d*). The conclusions of the common law for a long time lay so strongly in favour of the legal owner, that if the feoffee died seised, his heir became absolute owner of the land, discharged of the use; and this opinion prevailed till 14 Ed. IV. when the heir was held liable to a subpœna (*e*).

The conscientious discharge of the trust reposed in the feoffee was so regarded, that any stranger who became seised of lands by feoffment of the feoffees with notice of the use, was answerable to the *cestui que use* (*f*). A woman being *cestui que use* became covert, and was not allowed to

(*a*) 4 Ed. IV. 8. (*b*) 5 Ed. IV. 7. b. (*c*) 5 Ed. IV. 7. (*d*) Bro. Feoff. al Uses, 34. (*e*) Fitz. Subp. 14. (*f*) 5 Ed. IV. 7. b.

command her feoffee to make an estate; for he by so doing, it was said, would be guilty of a breach of trust, and be committed to prison by the chancellor (*a*); and under the like penalty, the feoffee was bound to maintain all suits incident to the freehold (*b*). Uses were thus established as a species of property distinct from the land out of which they issued; the land and the use were two independent subjects, and might reside in different persons. A gift of land by fine or feoffment without something more, did not now, as formerly, convey any interest in the land; the use accrued only by the express appointment of the feoffor, or upon some equitable right to it.

This is the height to which uses had grown in the period of which we are now treating: their consequences were carried much farther in the reigns of Henry VII. and Henry VIII.: already they had raised much jealousy in the courts of common law, and in the legislature. They were at first treated as little better than pretences to cover fraud, and were at length admitted rather as abuses which had obtained a legal form by sufferance; and in that light the parliament at different times endeavoured to correct and restrain their irregularities, without attempting entirely to eradicate them.

Indeed, uses were pregnant with great inconveniencies. The possession of land by *A.* to the use of *B.* was a concurrence of rights that could not fail of producing confusion. *A.* the *terre-tenant*, as the lawyers called him, was possessed of the land by the forms of law, and so was its *legal* owner; but a confidence was reposed in him by the giver of the estate, that he should hold it to the use of *B.* for this reason called the *cestui que use*. Thus *B.* received the profits; was in conscience and equity the owner; he enjoyed a credit and importance in the world by expending its produce, though the land was not liable to the engage-

(*a*) 7 Ed. IV, 14. b.

(*b*) 7 Ed. IV. 29. b.

ments which he was enabled to contract by means of that credit and importance. Thus a kind of deceit was practised on mankind. To remedy this, occasional expedients were applied, which were of some benefit in particular cases; while the disease, still vigorous, pervaded every part of the law of real property. The plan upon which these expedients were conceived was, to put the *cestui que use* into the same condition as if he was seised of the actual freehold by the solemnities of law. Such regulations, from the subject of them, were called the *statutes of persons of profits*, and have been already mentioned in their (a) proper places.

The last species of conveyance, if it can be so termed, and that which was nearly connected with gifts to a use, was that by will. The distinction between gifts of land by deed and by will became more strongly marked; for though, in a gift by deed, if the tenant of the particular estate refused to accept the livery, the remainder was void; yet if the first devisee refused, the remainder was still good, and he took in possession immediately (b). Another distinction was this: If land was given to a man and the heirs male of his body, and he had issue a son and a daughter, and died; the son entered, and the daughter had issue a son, and died; and then the donee died without issue male; here the son of the daughter was not to have the land, though he was heir male; but if it had been by devise, he would (c). And so of a devise by a man to *I. S.* for life, remainder to his heirs male, and to the heirs male of their body; he died; *I. S.* had issue a daughter, who had issue a son; and *I. S.* died: it was held, that the son of the daughter should have the land; and this was, because the will of the devisor should be fulfilled (d).

A notion had begun to prevail respecting the devise of a chattel, which was entirely novel. A gift of a chat-

(a) Vid. ant. 275. (b) 3 Hen. VI. 4. b. 37 Hen. VI. 37. (c) 27 Hen. VI. 8. Bro. Dev. 5. (d) 11 Hen. VI. 12. Bro. ibid. 32.

tel without any specification, or if for life, was heretofore considered as a gift for ever; a chattel not being respected by the law in the light of such permanent property as might be limited over from one to another, after the death of the possessor. But, at length, the following method was hit upon, by which a chattel might be bequeathed over, in like manner with real property. It was held, that a man might give, by will, a book to one of his executors, *to have and use* for the term of his life; remainder to his other executor, to have and use for the term of his life; and then to the parishioners of such a parish. The reason of this opinion was, because only *the use* was given for life; and therefore a sort of remainder over might be reasonable and consistent therewith. Such was ^{An executory} the origin of that sort of gifts which in later ^{devise.} times have been called *executory devises* (a).

In following the history of revolutions in the laws relating to property, the reader's attention has been principally taken up with that artificial and refined system, upon which a title to land and inheritances was governed; the magnitude as well as the difficulty of the ^{Of chattels.} subject requiring a very close and serious examination. The law of *chattels* is of a less complicated nature, and being regulated upon principles of plain sense, independent of the influence of any peculiar system of things, is more easily comprehended. The few opportunities that have hitherto presented themselves of speaking on this part of our enquiry, were when we considered the several actions in which chattels might become the objects of judicial discussion; and such idea of this kind of property as could be collected from thence, must be very imperfect. As personal property had of late years been growing into greater consideration, owing to the increase of trade and manufactures, it became more agitated in our courts; and lawyers bestowed upon it some share of that

(a) 37 Hen. VI. 30. Bro. *ibid.* 13.

attention, which seems, before, to have been wholly engrossed by the learning of real property. The reports of this period furnish several cases upon the qualities and incidents of this sort of property, with the nature of contracts and agreements, and other methods of transferring it from one to another. These are almost new subjects; and as they constitute the foundation of what has since been raised in modern times to such a height as nearly to overshadow and obscure the law of estates, they become extremely deserving the curiosity of a juridical historian.

The first point to be considered on this subject is, what things were deemed of sufficient importance to come under the denomination of property. Animals that were properly *feræ naturæ*, were not considered as being the property of any one. However, there was a sort of incomplete property, that accrued *ratione soli*, and gave the owner a title to an action for an injury done to them. Thus it was laid down, that a person who had a park or a warren, had not therefore such a property in the game thereof, as in an action of trespass for taking them to call them *lepores suos*, or *damas suas*; but yet he might declare for *mille lepores*, or *damas viginti*; and so it was adjudged over and over again (a). The same of doves and hawks (b). This idea was carried so far, as for it to be laid down for law, that no gift could be made of a deer in a park; and this seems to have been a general opinion; but chief-justice *Brian* endeavoured to make this exception to it, that a white deer, or any that seemed to be identified by some peculiarity, might be given away, as a thing in which a man had a clear property (c): and this distinction seems to conform with what had been laid down in a former period, that a man might have property in a tame deer (d). The scruple concerning the meaning of *meum* and *tuum* was once carried to a very extravagant length; for in an action *de malè ignem custodiendo*, the writ was *ignem suum*,

(a) 3 Hen. VI. 55. 7 Hen. VI. 38. 22 Hen. VI. 59. (b) 16 Ed. IV. 7.

(c) 18 Ed. IV. 14.

(d) 43 Ed. III. 24.

which was excepted to, because no one could have *property* in fire; but the objection was over-ruled as frivolous(*a*). If a man came into the freehold of another and cut trees, and made timber of them, the property was considered as remaining in the owner of the soil till it was carried away(*b*). If a sow was taken by way of distress, and then pigged, the owner might have replevin of the pigs as well as the sow, and recover damages for both(*c*).

It was a very old rule of law, that a man's property in any thing should not be transferred by the wrongful taking of it; a thing therefore so taken remained the property of the owner, whatsoever hands it might pass through, or by whatsoever means, except only by a sale in market overt; to which the law, for the security and confidence necessary in the dealings of men, allowed such credit for fairness, as to convey a clear title to a purchaser. But if goods were sold in this public manner by a collusion between the buyer and seller, or if the buyer knew that the vendor had taken them wrongfully, then the property would not be changed(*d*); and some went so far as to hold, that if the toll of the market was not paid, the property would not be changed(*e*). In such cases, and where the sale was not in market overt, the law was, that the owner might take his goods wheresoever he found them; but the seller would nevertheless be intitled to all the price agreed for between him and the buyer, who had no recompence but the admonition of *caveat emptor* to make him more circumspect on other occasions(*f*). If a man took the goods of another, and offered them to an image, the superstition of the age had allowed this to be as complete a change of property as a sale in a market or fair; but if they came back to the hands of the first trespasser, the owner might take them(*g*).

The construction of the common law upon the law of

(*a*) 2 Hen. IV. 18.

(*b*) 35 Hen. VI. 2.

(*c*) 12 Ed. IV. 5.

(*d*) 33 Hen. VI. 5.

(*e*) 35 Hen. VI. 29.

(*f*) 9 Ed. IV. 1.

(*g*) 34 Hen. VI. 10.

nations was, that any one might seize the goods of the king's enemies imported into the kingdom; and also the goods of Englishmen taken by such enemies, to the exclusion of the king, the admiral, and the owner, unless he came the same day they were taken, and claimed them *ante occasum solis* (a).

Of contracts. The most usual mode by which chattels were transferred from one person to another, was by bargain and contracts of several kinds, the law of which began now to be tolerably well understood. The foundation of every contract required that there should be a mutual benefit to both parties, that is, a *quid pro quo*; otherwise it was a *nudum pactum*, and such to which the law would not give effect. Thus where a man brought an action upon the case against another for not building a mill by a certain day, according to his engagement, the declaration was held ill, because it did not state that the defendant was to have been paid any thing for his labour, in which case the bargain would have been void (b). A promise to give a person a sum of money if he married his daughter, was a contract whose validity was much questioned, on the idea of there not being a *quid pro quo*. An action of debt upon such a promise was debated with some difference of opinion. In support of it many instances of bargains were quoted by *Prisot*, which he thought bore some similarity to the present, and were esteemed good in law. Thus if *A.* sold a horse for 10*l.* and had no horse at the time, yet he might have an action of debt for the money, though there was in fact no *quid pro quo*; but because if *A.* had a horse the buyer might take it, the bargain was to be supported in law. Again, if one sold his land for 100*l.* debt would lie for the money immediately, though the purchaser could not have the land without the ceremony of livery. Again, if a person was retained to be counsel for a certain sum, he might have an

(a) 7 Ed. IV. 14.

(b) 3 Hen. VI. 36.

action for the money, though the other might perhaps have had no advice from him: to which *Davers* added, that if a man promised another a sum of money, on condition of his carrying some corn belonging to *W. B.* and he carried it, debt would lie, though there was no *quid pro quo* (a). Notwithstanding these instances in favour of the action, the inclination of the court seems to have been against it; but the cause was adjourned without a decision.

Bargains about matrimony were very common, and many such actions appear in the books from the reign of Edward III. down to the time of which we are now writing. A distinction had been made, where the word *marry* or *marriage* was or was not used in the agreement (b); and the courts held, that the term *marry* or *marriage* had the effect of making it wholly a *spiritual* matter, so that an action ought not to lie for it in the temporal courts; but that otherwise an action would lie. We find no notice of such distinction now; but it was held *per totam curiam*, in the reign of Edward IV. that debt would not lie for *marriage-money*, because the defendant had not *quid pro quo*, and it belonged to the spiritual court (c). Yet a few years after, when this opinion was maintained by the master of the rolls, and by *Choke, Littleton, and Townshend*, the contrary was held by *Rogers and Sulyard* (d). So difficult was it to adjust a point of law that had once been agitated with different success.

A contract could not be perfect without the agreement of both parties. Thus if a person cheapened wares in a market, and the tradesman named the price, this was no bargain, so as to enable the buyer to take the goods, unless he paid the money, or a day of payment was fixed (e). If therefore such a person had gone away without paying, and had brought the money the next day, the seller would not have been obliged to accept it (f). When the bar-

(a) 37 Hen. VI. 8. (b) Vid. ant. 65. (c) 14 Ed. IV. 6. 15 Ed. IV. 32.

(d) 17 Ed. IV. 4. (e) 17 Ed. IV. 1. (f) 18 Ed. IV. 22.

gain was completed by agreement, the vendor was intitled to the price in all events, whatsoever happened to the thing sold. Thus, as was before seen, though the right owner should retake his property from a vendee, the vendor might still have an action of debt for the price (*a*). Again, where a man seised of land *in jure uxoris*, sold four hundred oaks for 20*l.* and half were taken during the life of the wife; she died, and, the baron not being tenant by the courtesy, the heir entered, and the husband brought an action of debt for the remaining half of the money (the former being paid in the wife's life, when the trees were removed); it was held a good action by the whole court; because the contract was good at the time of the bargain, and being intire, it could not be severed; wherefore having taken part of the oaks when he might have had the whole, the neglect was his own folly: but it would have been otherwise, if it had been agreed that he should not cut them before such a day, before which day the wife had died, for then he would not have had *quid pro quo*. In like manner it was held, that should a horse, after being sold, die in the stable of the vendor between the sale and the delivery, the vendor might have debt for the price (*b*). It was at the pleasure of the vendor to retain the horse till he was paid the price; and yet he could not have an action of debt till the horse was delivered; the property, however, was in the buyer by the bargain; so that if the buyer tendered the price, and it was refused, he might take the horse, or have detinue for it (*c*).

The law allowed contracts to include things not *in esse*. Thus a man might contract for the sale of all profits and tithes to come of his land the next three or four years (*d*). Again, a person might purchase wood for so much money, if he approved it when he saw it. In such case, if he disliked it, there was an end of the bargain; if he agreed

(*a*) Vid. ant. 371.

(*b*) 18 Ed. IV. 5.

(*c*) 18 Ed. IV. 22.

(*d*) 21 Hen. VI. 43.

to it, he was bound (*a*). The contract of a servant, attorney, or factor, was held to bind the principal so as to make him liable for the price, though the thing sold never came to his hands (*b*).

It seemed to be thought, that though a purchase of things for the use of a society, if agreed to by them, would charge them with the price; yet if the purchase was for them, it would not bind them without an apparent agreement; it might however be questioned whether the law would not interpret their use of the things purchased as an agreement; and so it was afterwards determined (*c*).

(*a*) 18 Ed. IV. 15.

(*b*) 8 Ed. IV. 11.

(*c*) 20 Hen. VI. 22.

CHAP. XXII.

HENRY VI. EDWARD IV.

Judicature in Parliament—Origin of private Acts—The Court of Equity in Chancery—Cases determined before the Chancellor—Of Proceedings by Bill in the King's Bench—Ejectione Firmæ—Actions upon the Case—Action of Forcible Entry—Of Forger of Deeds—Damages and Costs—Of Protections—The Criminal Law—Larceny—Of Appeals—Of Provors—Of Battel—Of Clergy.

THE administration of justice during these two reigns affords an object of enquiry equally interesting and important with the law of private rights. The novelties in this part of our juridical system consist principally in the perfection to which the science of pleading had arrived, the introduction of such new actions as had been given by some late statutes, and some slight variation in the form of judicial proceedings.

Judicature in parliament. Though the commons in the reign of Henry IV. (a) were checked in their attempt to partake in the judicial authority of the king and lords, and the letter of the resolution then passed stood on record against them; yet such a solemn declaration that their assent was necessary to all *statutes*, joined to some reasoning on the question, at length led to the establishment of this legislative right. The king and lords, however, went on making awards on petitions during the reign of Henry IV. and those that followed; till at last it became too clear, that all these, as alterations, in that par-

(a) Vid. ant. 277.

ticular instance, of the law, could no longer with propriety be called judgments or awards, but were to all intents and purposes legislative acts, and, as such, should be assented to by the whole parliament. We shall presently see the steps which led to establish the practice conformably with this opinion.

The criminal part of the original judicature in parliament was exercised in numberless instances during this period, and frequently assisted the reigning party in destroying their enemies, when the common tribunals (summary as even they were) could not, consistently with a colour of legal formality, completely execute their vengeance. We have no intimation that the commons were at all desirous of taking any part in these judgments. In a former reign (*a*), the lords temporal, with the king's assent, adjudged, that several lords, two knights, and others, who had been taken and beheaded as traitors and rebels, should forfeit all their lands in fee which they had such a day, with all their goods and chattels; to which judgment all the lords present put their names (*b*). This could not be considered as a judgment *secundum legem et consuetudinem Angliæ*; as it gave, contrary to the common law, a forfeiture of lands *after* the death of the parties, and that, too, where some of them were commoners. This could only operate as a legislative act.

Sir John Mortimer having been committed to the Tower on suspicion of high-treason, had escaped, and was in 2 Hen. VI. indicted for that escape: being again apprehended, he was brought before parliament, and judgment was given against him upon the indictment. This was a judicial act of the legislative kind, if it may be so called, which it does not appear the commons had any share in, nor did they make any protestation in support of their pretension. These are selected out of many cases of the like kind during the period of which we are now writing.

(*a*) Hen. IV.

(*b*) Parl. Hist. vol. II. 64.

Though the house of commons had acquired great weight in the constitution during these reigns, particularly under the house of Lancaster, there is no mention of their having concerned themselves in these parliamentary judgments of life and death. But at length a politic prince found it convenient to make use of them, to give colour to the prosecution of a great and obnoxious man; and by that measure paved the way to fixing the commons in this legislative right. This was in the proceedings against the duke of Clarence, in the 17th year of Edward IV. What makes this more remarkable is, that it was at a time when the steward of England presided, and the lords might seem to be no longer acting in their parliamentary character, but simply as a court. The king on this occasion was in the house, and appeared in the light of a prosecutor; for he was the person, and the only one, who enforced the charge against the duke. Some evidence was produced: the house of lords were of opinion, that the evidence was sufficient, and therefore proceeded to condemnation, the duke of Buckingham, for that time high-steward, pronouncing the sentence; but the execution was delayed. The charge against this unhappy prince was that of treason, with the overt acts of using incantations, and spreading reports of the king's illegitimacy; but his principal crime was aspersing the judges and juries who had concurred in the condemnation of *Burdet* and *Stacy*, two of his friends.

The king resolved to make this blow at his brother's life as sure as possible; thinking, perhaps, that the charge of treason was so slight as to need something extraordinary to give effect to it; or because the opinions of people had taken another turn upon this point of parliamentary jurisprudence: whatever was the motive, the king took the following measure; he directed the speaker of the house of commons and the members to be called before the other house, where a re-hearing of the whole matter was had in their presence. After this sanction, it was

thought the duke might be executed with safety; which was accordingly done (a).

We do not find that any formal act was made to testify the concurrence of the whole parliament in this judgment of attainder: however, this precedent of calling in the house of commons to assent to a prosecution and sentence, must have had a great effect towards encouraging them in maintaining this claim. The notions of what was law, and what was legislation, had become too well settled and distinguished for it to be longer endured that the law should be altered by any judgment less than a legislative act; or that any transaction should have the force of an act, which was not assented to by the whole parliament. The commons, by repeated revolutions in the government, had now risen to such importance, that they could be no longer overlooked. These considerations had operated so far in the time of Richard III. that he ventured to make no judgment by the assent of the lords alone, either on petitions in private matters, or in the prosecution of offenders; but, in both cases, the aid of the parliament was only to be obtained by a formal and complete act of the legislature. These, from the particular occasion of them, Origin of private acts. were called *private acts*. Several attainders, and several alterations in property, were made in the short reign of that usurper by these private bills; and this example was followed in the succeeding reigns. Thus have we seen the original judicature of parliament, which at first resided in the king and lords, participated by the commons, and at length become a mere act of legislation: the remaining judicial authority which they still retained, was that of a court of error, and of being their own judges in cases of life and death, and of deciding on impeachments by the house of commons.

The court of chancery grew into great consideration in the reigns of Henry VI. and Edward IV. The court of equity in chancery. Indeed the statute 15 Hen. VI.

(a) Roll. Parl. vol. VI. 193. Parl. Hist. vol. II. 373.

may be considered as adding a new support to this court; which, by restraining a wanton and inconsiderate application of its authority, confirmed it in a due and regular administration of justice. That the legislature should at different times express a jealousy of this new judicature by *subpœna*, and impose checks upon the exercise of it, is not to be wondered at: the idea upon which this court had taken upon itself to decide according to principles of equity and general justice, was novel and adventurous. It was to afford relief to suitors, upon circumstances of hardship, fraud, or trust, where the king's courts allowed none. This was, in effect, an appeal from the ancient customs and statutes of the realm to the conscience and discretion of a single person. It appeared like changing the rules of right; like renouncing the government of law, and preferring that of arbitrary will. Added to this, when it is considered that the chancellor presided there alone, without the influence of common-law judges (except when he chose to call in their advice) to controul the force of his own particular notions; that he was a person unlearned, for the most part, in the common law; and an ecclesiastic, bred up, as was then usual, in the study of the civil and canon law; from these considerations it was extremely probable, that, in a course of time, a set of rules and maxims of justice would gain ground in that court, differing from, and derogatory to, the common-law. These were natural apprehensions, and in the event proved not to be wholly unfounded.

Not only the education of the judge who there presided, but the very intent and design of his jurisdiction naturally led to what was foreseen. The canon and civil law furnished a system of rules, and a course of proceeding, extremely well adapted to the objects of inquiry in a court of equity. The large principles of universal justice taught by the Imperial law, were calculated for any set of people, and any state of things. These furnished grounds of reasoning to model, correct, and qualify the untoward conse-

quences of our partial-municipal customs; while the ecclesiastical jurisprudence supplied a method of proceeding, in the examination of witnesses and of the party, peculiarly contrived to sift the conscience of a designing and fraudulent defendant. The chancery being, like other courts, at liberty to form its own method of proceeding, adopted that which best answered its design; and accordingly, a proceeding formed from the civil and canon law together, gradually became the practice of the court of chancery, without any interference or controul of the legislature. But the chancellor was not left at liberty intirely to establish the rules of justice dictated by the civil law. This was a matter of much more importance in its consequences than the other. In this instance he was narrowly watched by the judges, who, in many cases where their advice was called in, put some check on the liberal conclusions derived from those plausible topics, the fitness, and convenience, and the substantial justice of a cause, which were the principal grounds on which the chancellor used to rest his equitable decisions.

It is beyond a doubt, that this court had begun to exercise its judicial authority in the reigns of Richard II. Henry IV. and V. as appears from what has been before mentioned (a). But we do not find in our books any report of cases there determined till 37 Henry VI. except only on the subject of uses; which, as has been before remarked, might give rise to the opinion, that the first equitable judicature was concerned in the support of uses. Leaving uses to be considered hereafter, we shall now take a view of such points as were resolved in this court during the reign of Henry VI. and the subsequent one; being the earliest notices we have, in the annals of our law, of the nature and progress of this new court of equity.

The following case was before the chancellor in 37 Hen. VI. A person bought up some debts owing to another, and gave him a

Cases determined before the chancellor.

(a) Vid ant. 188.

bond to the amount. He now preferred a bill in chancery to be relieved from the obligation, alleging, that as *choses* in action were the subject-matter of the contract, and these were not transferable, he had in reality received no consideration, and should therefore in conscience be discharged from the obligation. The chancellor, having doubts, adjourned it into the exchequer-chamber, where it was agreed, with the concurrence of all the judges of the king's bench and common-pleas, that the obligation should be cancelled; and if the defendant refused, that he should be committed to the Fleet till he complied (*a*). But when this matter was afterwards pleaded to the obligation sued in the common-pleas, the plea was over-ruled, and the deed was considered as still in force; it being conceived, that the only power the chancellor had of enforcing his decrees, was by inflicting imprisonment on the contumacious party, who might still prosecute his legal rights in a court of law, notwithstanding they had been determined in chancery to be unconscionable.

A grant was made, by letters patent, of goods forfeited by a person attainted; the grantee brought his bill in chancery against the person who had then the possession of them, for this reason, that as the king could not have an action at law for the goods of an outlaw, or one attainted, before they had been seized for the king's use, or found by matter of record, much less could the grantee maintain a common-law action without having had the possession. Accordingly it was held, that the *subpœna* was his only remedy; and the defendant was ordered to exhibit an inventory of the things the next day, on pain of being committed to the Fleet (*b*).

In the reign of Edward IV. the following points were determined: A man was bound in an obligation to *B.* for the use of *C.*; it was held, that in this case *C.* should have a

(*a*) 37 Hen. VI. 13. Bro. Consci. 4.

(*b*) 39 Hen. VI. 26. b.

subpœna against the obligor (*a*). One coparcener would not count according to the truth, and in the same manner as the other coparcener had done; and there it was held that a *subpœna* lay (*b*). Where a person had made another the procurer of his benefice, and had faithfully promised him (*c*) that he would save him harmless from the consequences of holding it; when he afterwards resigned it, and was vexed on account of the part he had acted, it was agreed, that a *subpœna* lay for such indemnification: and it was there said, If I promise to build you a house, and do not perform my promise, you have your remedy by *subpœna* (*d*). It was a doubt at this time, whether a *subpœna* would lie against an executor or heir; and it seems after much debate agreed, that it would not lie against the heir of the feoffee; but he might hold the land discharged of the use, and the *cestui que use* was driven to seek redress in parliament (*e*). Yet where a man had made a fraudulent gift of his goods to avoid his creditors, and the person to whom they were given died, and they came to the hands of his wife; there, when a bill was filed against her, she was compelled to answer it (*f*). And before that, the following case was decided: *Worsley*, a baron of the exchequer, and one *Middleton*, bought some wool of Sir *H. Wych*, for which they bound themselves in several obligations. *Middleton* had all the profits of the merchandize. Sir *H.* died, and made his lady his executrix; and by his will gave a longer day to *Middleton*. Upon this, *Worsley* brought his bill against the executrix, to discover what was owing, and to account; the bill was held good; and it was agreed that a bill might be brought to make a person discover his testator's will, and the trust there declared (*g*).

(*a*) 2 Ed. IV. 2. (*b*) 6 Ed. IV. 10. (*c*) *Promitto per fidem*. (*d*) 8 Ed. IV. 4. b. Vid. ant. vol. II. 379. (*e*) 8 Ed. IV. 6. (*f*) 16 Ed. IV. 9. b. (*g*) 9 Ed. IV. 41.

A man was surety for one, who joined with others in a bond to save the surety harmless; afterwards the surety paid the money, and sued upon the indemnity bond: in the mean time, the first debtor brought his bill in chancery, and set forth, that before the bond was given to indemnify, he delivered certain goods to the surety, as a security for the same eventual burthen on him; and therefore he now prayed restitution of them, that he might not be doubly charged; and also he prayed an injunction: the latter prayer was denied, upon the defendant in equity claiming a property in the goods (*a*). The cognisor in a statute-merchant had paid the money, without a release; and the cognisee, notwithstanding this, sued him at law: a bill being brought in chancery, it was a question, whether he should have relief. The chancellor had great doubt, and called in the assistance of the judges in the exchequer-chamber; where, after much argument, the chancellor was convinced, that, in the instance of a statute-merchant, which is a matter of record, as the party need not have paid the money without a release, it would not be consistent with the rules of law to relieve; but as to obligations, which are matters *in pais*, that question was left open to consideration (*b*).

The style of pleading in equity was of a more liberal cast than that in the other courts. It was held, that a person should not be prejudiced for mis-pleading, nor want of form; but if he proved such matter as served to aid him *in conscience and equity*, it was sufficient. The authority of this court was, as they expressed it, *secundum potestatem absolutam*; while at common law they were said to proceed *secundum potestatem ordinatam* (*c*).

Such were the advances made by the court of equity towards relieving suitors against the rigour of the common law. Its jurisdiction did not comprehend a great extent;

(*a*) 16 Ed. IV. 9.

(*b*) 22 Ed. IV. 6.

(*c*) 9 Ed. IV. 15.

and the exercise of it was feeble and imperfect. The chancellor seldom had a point of difficulty before him but he called in the advice of some of the judges, or adjourned it into the exchequer-chamber, where it was discussed and resolved according to the opinion of the sages of the common law. This had the effect of settling on the solid foundation of the law of the land this new jurisdiction, which all the while grew up under the guidance and encouragement of the courts of common law. Owing to this state of pupillage in which the court of equity was kept by the courts of common law, and the unfavourable comparison it suffered when opposed to the ancient judicatures of the realm, it appeared rather as tolerated in certain instances, than acknowledged as a part of the judicial establishment of the kingdom.

The following fact is a strong instance of the imbecility of this court. In the 22d year of Edward IV. (a) after a verdict, an injunction had been obtained, which hung up the cause for some time. *Hussey*, chief-justice, asked the counsel for the plaintiff, if they would pray judgment according to the verdict; but they declared their apprehensions about infringing the injunction. To this one of the judges said, that though the injunction was against the plaintiff, yet his attorney might pray judgment with safety; and so *vice versâ*. *Hussey* said, that they had talked over the matter among themselves, and they saw no mischief which could ensue to the party, if he prayed judgment; for as to the penalty of the injunction, they were convinced it was not leviable by law; and then there remained nothing but imprisonment: and as to that, the chief-justice said, "If the chancellor commits any one to the Fleet, apply to us for a *habeas corpus*, and upon the return of it we will discharge the party; and we will do every thing to assist you." It is true, one of the justices said, he would go to the chancellor, and ask him to dissolve the in-

(a) 22 Ed. IV. 37.

junction: but this probably was suggested out of tenderness to the chancellor's situation; for they agreed in declaring, that they would give judgment if the party would pray it, notwithstanding the chancellor continued the injunction; but they said, they would not give damages for the loss occasioned by the proceedings in chancery.

It seems that the chancellor, besides the assistance of the masters in chancery, who properly composed his council, and were his ordinary assistants to sit with him, and gave their opinion when asked, used also to associate to him sometimes peers and bishops, but more commonly some of the judges. In consequence of this, the decrees ran, *Per curiam cancellariæ, et omnes justitiosarios*: sometimes, *Per decretum cancellarii ex assensu omnium justitiosariorum, et aliorum de concilio regis præsentium*. Again, *Ideo consideratum est per curiam de assensu Johannis Fortescue, capitalis justitiosarii domini regis ad placita tenenda, et diversorum aliorum justitiosariorum et servientium ad legem in curiâ præsentium*. Thus the form varied as often as the person or persons by whose assent the judgment or decree was made (a). From this we see, that the chancery still preserved some traces of its constitution in the time of Edward III. (b) when references used to be made to the chancellor, treasurer, and others of the king's council in chancery. This was the state in which the authority of the court of equity in chancery stood at this period.

The new jurisdiction in the court of king's bench had assumed a novel appearance. We have seen in the reign of Edward III. (c) that a practice had obtained of commencing actions by bill in either of the three courts in Westminster-hall; but nothing has yet been said on the nature of that proceeding; the books preserving a silence therein, till the reign of Henry VI. when there happened some cases which shew that such bills in the king's bench used to charge the defendant as *in custodia*

(a) Hist. Chanc. 80. (b) Vid. ant. vol. II, 409. (c) Vid. ant. 93.

mareschalli, intimating that circumstance to be the foundation for the proceeding. It seems, that the persons in the custody of the marshal of that court might be declared against by bill for any cause of personal action, notwithstanding the prohibition of *Magna Charta*, which was construed not to extend to this privilege claimed against prisoners. The court, however, guarded this custom, which it had suffered to obtain, by a strict adherence to the notion of law on which it originated; they required that the person should be an actual prisoner of the court. Thus in 7th of Hen. VI. where a man was out on bail, it was held (a), that a bill could not be filed against him as in custody. It was more-

Of proceeding
by bill in the
king's bench.

over required that there should be some proof on record of the defendant being in custody (b); for otherwise it was said, it lay at his option whether he would plead to the bill.

Many devices were contrived to effectuate this requisite of custody; one of which seems to have been the exhibiting of articles of the peace (c); so strenuously did they endeavour to preserve the proper character of this tribunal as a criminal court. However, in 31 Hen. VI. they seem to have relaxed a little on this point. It was then held, that if it appeared that a person was out on bail, this of itself was sufficient ground to the court to proceed against him as in custody, whether the cause of his commitment appeared or not. Thus the ground of the court's jurisdiction became a fiction, and the king's bench began to entertain suits against persons, who were only *supposed* to be in custody, provided there were some slight grounds to warrant the supposition. It was sufficient therefore to file a bill with pledges to prosecute, and then by a copy of that bill or by *latitat* (d) to arrest the defendant, who gave bail to appear; and then, though out of custody on bail, he

(a) 7 Hen. VI. 42.

(b) Ibid. 41.

(c) Ibid.

(d) It may be remarked, that the absconding from process is expressed in Bracton by the verb *latitare*. Vid. ant. vol. I.

still was deemed liable to plead to a declaration filed against him in any action, and this became the settled practice towards the latter end of the period of which we are now writing.

When the proceeding in this court by bill was rendered so easy, it may be supposed that suits of every kind were brought here in that way very frequently, and that the civil business of the court began considerably to increase. The number of actions upon the case (which too could be brought by original here) increased the subjects of judicial cognisance in this court to a nearer proportion with those of the common-pleas, than it had ever before exhibited.

The declaring against persons *in custodia mareschalli* is a singular phenomenon in the history of practice in the court of king's bench; and it became more extraordinary when extended, as we see here, to all persons, without any regard to the actual custody of the marshal. It has been intimated, in a former part of this work, that the jurisdiction of the steward and marshal was communicated to the court of king's bench, and particularly discovered itself in this proceeding by bill (a). The reader may be better able to judge after he has weighed the following considerations, whether this is a probable conjecture to account for the novel proceeding of which we have just been speaking.

It has been before related, on the authority of Fleta, that the steward determined the king's own causes without suit; that he had cognisance of all actions against the king's peace within the verge, *ubicunq; tunc rex fuerit in Angliâ*; that such actions were to be brought *recenter*. In another place he tells us, that the steward had cognisance of all trespasses and personal actions, *per inventionem plegiorum de prosequendo*, without allowing any essoin; that upon pledges being found and enrolled, the marshal was commanded to attach the party, if he was within the verge; that this court removed with the king, and by its presence sus-

(a) Vid. ant. vol. II. 250.

pended all commissions of eyre, assise, gaol-delivery, and others within the same county, the business of which courts was summoned before the steward; that he dispatched them first, then proceeded to the trespasses within the verge, and to debts and contracts where persons had bound themselves to the distress of the steward and marshal (a). Such are the principal features of the steward's court, according to the practice in the reign of Edward I. To this may be added what is mentioned by Britton, that the steward was allowed that singular privilege, which none but himself and the justices of Ireland and Chester had, of delegating his judicial authority without a special permission from the king (b).

It is not unlikely that the steward used to avail himself of this power to delegate, and it is natural that the judges of the king's bench should be the persons whom he delegated, they being, like him, obliged to attend *ubicunq; rex tunc fuerit in Angliâ*. This is rendered more probable by the similarity of jurisdiction which we see in after-times exercised by the judges of the king's bench. We see the king's bench by its presence suspend all courts within the same county; we find that it had marshals who travelled with it through the several counties; and that in a statute of Edward III. these marshals are coupled in a remarkable manner with the marshal within the verge (c). When, therefore, we find also a proceeding in this court *per inventionem plegiorum*; when a person, merely because he was supposed to be *in custodia mareschalli*, might be proceeded against for debts and contracts; where can we look for the origin of such innovations, but to the model preserved in the ancient history of the steward's court?

The judges of the king's bench, when once in the habit of exercising this jurisdiction within the verge, may easily be supposed, in the usual course of judicial aggrandizement, *ampliare jurisdictionem*, to extend this new proceeding to

(a) Vid. ant. vol. II. 247 to 250. (b) Britt. 10. edit. Kelb.

(c) Vid. ant. vol. II. 421, 422.

all persons, whether within the verge or not. While the king's bench was moulding this borrowed piece of judicature so as to aggrandize its authority, the ancient court of the steward and marshal, under the presidency of less active managers, sunk into discredit. It was, at various times, expressly restricted by parliamentary regulations (*a*) to its original boundary of the verge; and the steward never reviving those branches of his supreme jurisdiction which had been so often delegated, the court became of no more consideration than others that are confined to a small local jurisdiction (*b*).

Ejectione firmæ. Next to the jurisdiction of courts, the objects which present themselves are the various actions now in use. But these being the same as were so fully examined in the reign of Edward III. it will be unnecessary to add any thing to the account there given, except by an observation on the action of *ejectione firmæ*, and a short view of the decisions that were made respecting the nature and properties of actions on the case. Some opinions began to prevail respecting the effect of the writ of *ejectione firmæ*, which led the way to an important change in real remedies. In the reign of Edward III. and again in that of Richard II. we find it expressly laid down, that an *ejectione firmæ* was, in its nature, only an action of trespass; and that the plaintiff therein could no more recover his term unexpired, than he could in trespass recover damages for a trespass not committed; and that the only remedy for the term was in covenant against the lessor (*c*). This was the opinion of the whole court. But in the reign of Edward IV. it seems

(*a*) Vid. ant. vol. II. 420. 235.

(*b*) However, the marshalsea court, situated near the prison of the marshal of the king's bench, may be regarded as retaining so far some mark of the ancient stock from whence the latter flourishing branch of judicature has sprung. It was not without a very substantial reason, that the king's bench originally sent their prisoners into another county for confinement; and the neighbourhood of the ancient court of the steward and marshal seems to point out that reason with some shew of probability.

(*c*) Fitz. Eject. 2.

to have been held differently; for there it is said, in argument, that in *ejectione firmæ* the plaintiff shall recover what remains *unexpired* of his term, as also damages for the time it was withheld from him (a). This was only a *dictum*; but we shall see, that in the reign of Henry VII. it was solemnly so determined. In consequence of that decision the action of *ejectione firmæ* became more frequently used, as a substitute to the many real writs for recovering possession and trying titles to lands.

The action most favoured was that of *trespass* Actions upon the case. *upon the case*, which, during these two reigns, expanded itself in a manner that made it applicable to numberless cases for which the common law had not before provided any remedy. In addition to those we have already seen, we now find it brought against an escheator for a false return of an office (b): against a man whose dog bit the plaintiff's sheep, the defendant knowing the dog was used so to do (c): against a clerk for not entering a nisi prius record as he assumed to do (d): for suing a writ against the plaintiff without consent of the principal (e): for arresting the plaintiff while he was coming to answer in a cause depending against him: against an under-sheriff for embezzling a writ (f): for beating the plaintiff's servant (g): for erecting a mill near an ancient one, at which the tenants were used to grind their corn (h): against an abbot who ought to find a chaplain to do divine service at a manor chapel, but neglected so to do (i): against a gaoler for the escape of a person in custody *ad computandum* (k): for calling the plaintiff and claiming him as the defendant's villain (l): for disturbing the plaintiff's steward in holding a leet (m): against an innkeeper for not lodging the plaintiff (n): against a vic-

(a) 7 Ed. IV. 6. b.

(b) 9 Hen. VI. 60.

(c) 23 Hen. VI. 7.

(d) 34 Hen. VI. 4.

(e) 7 Hen. VI. 43.

(f) 19 Hen. VI. 29.

(g) 21 Hen. VI. 8.

(h) 22 Hen. VI. 14.

(i) 22 Hen. VI. 46.

(k) 15 Ed. IV. 19.

(l) 15 Ed. IV. 32.

(m) 38 Hen. VI. 16.

(n) 39 Hen. VI. 18.

tualler for not providing victuals for the plaintiff (*a*): for forging a bond and putting it in suit (*b*); for disturbing one in an office, so as to prevent his getting possession, and bringing an assise (*c*): for injury done to goods by the person to whom the plaintiff's bailee bailed them: for the death of a horse bailed to the defendant to be safely kept (*d*): for superseding an action by false privilege (*e*): for riding a horse so as to disable him for several days (*f*): for not making a purchase for the plaintiff, which the defendant undertook to make (*g*): for not performing a promise or undertaking (*h*).

The discussion which arose on these new actions upon the case, as well as on others which have been before mentioned, is well worthy the attention of the reader, as we therein see the principles which led to the establishment of this liberal and comprehensive action.

The action against the escheator was founded on the same principle as the many we have already mentioned against sheriffs for false returns. Sheriffs and escheators, though *officers* of record, were not justices of record, even when in the employment of taking inquisitions; for if so, it was held no action could lie (*i*). It seems not to have been a settled point that an action would lie against an innkeeper, or a victualler. It is laid down by *Moile*, that it would; but by *Prisot*, that it would not; in which *Danby* seems to concur (*k*): and it was afterwards held by all the justices, that an action would not lie against an innkeeper if he refused a lodging: but the remedy was to complain to the *ruler of the vill*, who would give proper directions in the matter (*l*); which agrees with what *Prisot* had before suggested, who referred it to the constables of the place to give directions.

(*a*) 39 Hen. VI. 18. (*b*) 5 Ed. 4. 126. (*c*) 6 Ed. IV. 9. (*d*) 12 Ed. IV. 13. (*e*) 24 Ed. IV. 22. (*f*) 21 Ed. IV. 79. (*g*) 11 Hen. VI. 18. (*h*) *Passim*. (*i*) 9 Hen. VI. 60. (*k*) 39 Hen. VI. 18. (*l*) 5 Ed. IV. 2.

The old questions upon the distinct properties of trespass, trespass upon the case, and nuisance, still continued unsettled (*a*). Some distinctions were made, which seem to furnish a principle by which the separate office of these actions might be known. If a road was straitened or embanked, an action upon the case lay; if it was entirely stopped, an assise of nuisance, says *Moile*; to which *Prisot* assented, provided it was stopped by the tenant of the soil; for if it was by a stranger, he held it should be an action on the case (*b*). If a man lent a horse to ride ten miles, and he was rode twenty, it was the opinion of *Choke*, that trespass was the proper action; but *Brian* held it was trespass on the case only; and he put a distinction between such mis-feasances and those committed when the person acted under authority of law; as where a distress was used, or a man would not go out of a tavern at a seasonable hour, for these were trespasses (*c*). Accordingly it was on another occasion laid down, that if a bailiff cut trees without cause, or killed sheep, or if a butler broke open his master's hamper, and the like, trespass would not lie, because they had a lawful possession, but the remedy was by action on the case (*d*); and the above distinction between a licence in deed and a licence in law was confirmed (*e*); the one being allowed to be the subject of trespass, and the other of trespass on the case.

One of the old remedies trenched upon by the new action upon the case, was *deceit*; and, in like manner, it often became a question when the old writ of deceit was the proper remedy, and when an action upon the case. Where a person made a promise to do any thing, and broke that promise, there trespass on the case lay; but if he performed it in words, and by some false dealing rendered the performance of no effect, there deceit lay; as if a man

(*a*) Vid. ant. 27. (*b*) 33 Hen. VI. 26. (*c*) 12 Ed. IV. 8.

(*d*) 18 Ed. IV. 27. (*e*) 21 Ed. IV. 76.

who had undertaken to infeoff another, first charged the land and then made the feoffment, or first infeoffed a stranger, and then entered and made the feoffment he had promised to make, this was a proper subject for the old writ of deceit (a).

This brings us to actions upon the case for non-performance of promises, which had been so repeatedly canvassed in the reign of Henry IV (b). All the topics then agitated were again brought forward during the period of which we are now writing; but the courts shewed great inclination to over-rule the scrupulous objections which were thrown in the way of this action. In the 3 Hen. VI. the distinction that had been made between a non-performance and a negligence or malfeasance, was denied. An action on the case was brought against a mill-maker for not making a mill by a certain day, as he had undertaken. It was objected, upon the principle of the determinations in the time of Henry IV. that if the mill had been made ill, the covenant would have been turned into a tort, and trespass on the case would lie for the mis-feasance; but here was a *non-feasance*, which sounded merely in covenant. To this *Babington* answered, that if one made a covenant to cover a house by a certain day, and he neglecting to do it, the rain came in and damaged the house, the owner might have an action of trespass on the case for the damage: the same said *Cockain*, if a man neglected to make a ditch, according to his covenant, and my corn was thereby damaged: the same said *Strainge*, if my covenant-servant neglected to do what I ordered him. After this manner of arguing, it was observed by one who was inclined against the action, that if this was allowed, every covenant that was broken might be made the subject of an action upon the case (c).

Notwithstanding these decided opinions, we find a few years after, similar topics were urged against these

(a) 20 Hen. VI. 34.

(b) Vid. ant. 244.

(c) 3 Hen. VI. 36.

actions upon promises. It was said, that where a man was retained to purchase a manor for me, and he did not do it, I could have no action against him, unless it was by deed, and then I might have covenant; but if he assisted another in making the purchase, this was a deceit upon me, and I might have an action on the case; and this distinction was recognised by most of the court (a).

An action was brought against a man who had undertaken to procure certain persons to give releases, which undertaking he did not perform: it was on the case, and the same arguments were used against it as against the former. This being, they said, merely a *nonfeasance*, the remedy must be in covenant. But this was explicitly denied by *Iuyn* the chief-justice, and *Paston*; and they stated the common cases of a carpenter, a surgeon, and the like; who, if they undertook, and did nothing towards the performance of that undertaking, should be liable in an action on the case, and the party should not be driven to an action of covenant (b). When an action on the case was brought against a man for not delivering wine according to his undertaking, the same arguments were again urged against the form of the action, and the same answers given (c): as the parties in that case came to an agreement, there was no judicial determination of the point.

However, it sufficiently appears from what had been thrown out, that the opinions upon this question were now somewhat changed; and the best lawyers began to think, that an action upon the case was a proper remedy to recover damages for *non-performance* of an agreement, as well as for any *mis-feasance* in the performance of it. Accordingly we find it laid down by Newton, in 22 Hen. VI. (d) that if land was sold, the vendor might have debt for the

(a) 11 Hen. VI. 18.

(b) 14 Hen. VI. 18.

(c) 21 Hen. VI. 55.

(d) 22 Hen. VI. 44.

money, and the vendee might have an action upon the case, if he was not infeoffed of the land; which passed without any contradiction. We have every reason to suppose, that the *promise* meant in the reports of this period was an *actual* undertaking which could be proved, and not such an *implied* promise as was in after-times pronounced to arise in point of law in cases where a duty was previously due. It was also generally agreed, that a consideration for such promise should be stated in the declaration, as it would otherwise be a *nudum pactum*, to which the law would never give effect.

The action upon the case sometimes applied, amongst others, to instances where the old remedy was by detinue. The wager of law, which was allowed in that old writ, made it very desirable to substitute the action upon the case in its room. An action of detinue had been brought for a horse which the plaintiff had bailed to the defendant, and which had died through his negligence. The defendant having waged his law, and so got rid of that action, the plaintiff brought another grounded upon his case; but the law-wager being pleaded, that was argued to be a sufficient bar, as the plaintiff would, in this action, recover in damages the value of the horse; whereas by the judgment in the writ of detinue, he was estopped to claim the horse itself, and so he ought not to recover the damages to the value of the horse in the present action. Again, where an action on the case was brought, *for that whereas* the plaintiff had bailed certain goods to *A.* to keep, *A.* bailed them to the defendant for the plaintiff's use, but he had used and spoiled them; *Brian* thought the action would not lie, because the defendant was a stranger to the first bailment; but all the other justices were of a contrary opinion (*a*).

Thus was the action upon the case by degrees adapted almost to all purposes; sometimes as a remedy where the

(*a*) 12. Ed. IV. 12.

common law before furnished none, and sometimes in the place of the old established actions, which were found less adequate than this to obtain the ends of justice. It was the usual mode of redress in most instances of *malfeasance* or *negligence*, whether of private persons or of those in office; and the party thereby received a recompence in damages for the wrong sustained. Numerous are the instances in which this action had already been applied; the reports of which have come down to us. These afforded a ground-work to extend it by a reasonable analogy to all the consequences which have since been built upon it: so that the specific writs before in use, as the writ of deceit, of conspiracy, of detinue, and others, began gradually to go out of practice; and actions upon the case, of a liberal conception, were framed in the nature of those remedies. It only remained to give efficacy to the actions of *assumpsit*, as a substitute for the action of debt; and then the method of legal redress in regard to personal injuries will have suffered a complete revolution. During this period, the steps above recounted were made towards effecting this change.

It will be proper to take notice of two actions which had lately made their appearance, and were founded upon statutes passed in the preceding reigns: these are the actions of forcible entry, and of forger of false deeds.

The (a) statute of Henry VI. had given an Action of forcible entry. assise or writ of trespass to recover treble damages for a violent possession of lands or tenements; but the action most in vogue being trespass, an assise was not so frequently brought. It was therefore in an action of trespass for a forcible entry that these statutes were enforced, if it was meant to proceed civilly; if criminally, there might be a presentment, or one justice might proceed in a summary way, as directed by one of those statutes.

These statutes, being for the suppression of force and

(a) Vid. ant. 289.

violence, seemed to require a more rigorous construction than the judges had put on them. Thus it was held by them, that the issue in this action should be on the title, and never on the force; and if the title was found against the defendant, he would, it is true, be *eo facto* convict of the force; but if the title was found for him, the force would not be at all considered (*a*). The force, however, might be punished in an indictment afterwards, notwithstanding the title was with the defendant. On the other hand, if possession was restored to a disseisor by virtue of the statute, because he had been three years in peaceable possession, yet the disseisee might re-enter peaceably, or have an assise (*b*). It was held, that forcible entry would lie of a rent as well as of land; for a man might be disseised of a rent, and might have a writ of entry sur disseisin (*c*). Process of outlawry lay for a forcible entry, as was natural in an action of trespass (*d*). The statute only gave treble damages; but it was the opinion of the judges, that treble costs should likewise be recovered (*e*).

The action of forger of false deeds was a civil remedy for recovery of damages for the injury sustained by the party interested in the effect of such fictitious deeds. This remedy was founded on stat. 1 Hen. V. c. 3. (*f*) and the construction put on it was as follows.

It was a good plea to this action to say, that the plaintiff had nothing in the tenements at the time the deed was forged and published (*g*). The degree of interest was, therefore, an object to be considered in this action. It was doubted at one time, whether a remainder-man had a sufficient estate to intitle him, under the statute, to bring an action for forging a deed that affected his interest. On one hand it was contended, that he had possession of the remainder, though not of the demesne; and it was said, that

(*a*) 21 Hen. VI. 39, (*b*) 22 Hen. VI. 17. (*c*) 22 Hen. VI. 23.
20 Hen. VI. 11. (*d*) 37 Hen. VI. 23. (*e*) 22 Hen. VI. 37. (*f*) Vid.
ant. 262. (*g*) 21 Hen. VI. 51.

where an estate was made for life, the remainder over, the deed belonged to the tenant for life during his life; and yet if a stranger got possession of it, the remainder-man might have an action for it, and the tenant for life might have another action (a). An heir had been allowed ^{Of forger of deeds.} to maintain this action against a person who had forged a release during his father's life (b). But this latter opinion (at least where the publication was not till after the father's death) was afterwards denied by *Brian, Littleton*, and *Choke*; for the heir had no right during the father's life, and the action was both for forging and publishing: and yet it was held by *Choke, Littleton*, and *Needham*, that if the forgery was committed while a disseisor was in possession, and after the disseisee had entered the publication was made, the disseisee might have an action, because he had right during the disseisin; and *Littleton* held, that where the forgery and publication were during the time the disseisor was in possession, both might have an action, because one had the right, and the other the possession. In the case of a tenant for life, with remainder over in fee, *Littleton* held, as was before laid down, that both the tenant and remainder-man might have an action (c). The deed, to be a subject of this action, must be both published and forged; but if the action was brought against two, it was sufficient if the forgery was proved upon one, and the publication on the other, for the plaintiff would then be intitled to recover (d).

From actions the transition is natural to proceedings therein, and the nature of pleading. The latter is a branch of the law which was cultivated with great attention during this period, and deserves a very particular consideration: we shall, therefore, reserve what we have to say on that subject to a chapter by itself, and at present go on to speak of some other points which relate to proceedings in

(a) 23 Hen. VI. 22. (b) 7 Hen. VI. 34. (c) 15 Ed. IV. 24.

(d) 20 Hen. VI. 11. 14 Ed. IV. 2.

actions. The first of these will be the adjudication of damages and costs, the nature of which has not yet been at all noticed.

Damages and costs. *Damages and costs* might either be assessed by the jury in a gross sum (*a*), or separated, so much for damages, and so much for costs. It should seem, the court exercised a discretionary power to abridge or increase damages and costs; but this was with some distinction. Thus, after a writ of enquiry, they might either increase or abridge both the damages and costs as they pleased, because this was only an inquest of office to inform the court, who might have assessed the damages without an inquest. But where an inquest passed on an issue joined between the parties, there, though the court might increase the costs, they could neither increase nor diminish the damages; because there the party might have an attaint if he was dissatisfied, which could not be in case of a writ of enquiry. However, even in such case, if the damages were excessive, the court would sometimes suspend the judgment till the plaintiff released so much of the damages as would reduce them to a reasonable sum (*b*).

It had, indeed, on a former occasion been held, that where the principal demand was certain, the court might, after a verdict upon an issue, increase the damages as well as the costs. This was in an action of debt, and the jury having found a gross sum for the damages and costs, the plaintiff prayed that the damages might be severed from the costs, in order that the latter might be increased; which the court declined, upon the idea that they, in this case, had an authority over both (*c*). Again, in trespass, where the jury had found greater damages than were laid in the declaration, the court took upon them to abridge the damages down to the sum in the declaration (*d*). Whatever doubt there might be respecting damages or costs after a verdict, there seems none concerning either after a writ of

(*a*) 18 Ed. IV. 23,

(*b*) 19 Hen. VI. 10.

(*c*) 10 Hen. VI. 24.

(*d*) 2 Hen. VI. 7.

inquiry, or upon confession, and the like. We find upon a plea of *tout tems prist*, and judgment of *sit inde quietus*, &c. that the plaintiff used to be admitted to make an averment *pro damnis suis occasione detentionis*, and to pray that such damages might be allowed him (a). What is still more striking, there are instances of such averments against the sheriff for not returning greater issues upon jurors; and on these averments it is to be supposed the court used to award damages according to their discretion (b).

Much confusion seems to have arisen from the mixing of damages and costs together, which was done not only in the verdicts of jurors, but also in the award of the court. When they were confounded in the verdict, it was not uncommon for the plaintiff to pray they might be severed (c); it being his object to see that the costs were not taken into the amount of the damages, as that might create difficulty, should an attainder be afterwards brought. The entry of costs, when increased by the court, was always stated to be at the prayer of the plaintiff: *Ideo consideratum est, quodd recuperet versus A. prædictum debitum suum prædictum, et damna sua prædicta ad 40 shill. per juratores prædict. in formâ prædictâ assessos, nec non 40 shill. eidem B. AD REQUISITIONEM suam pro misis et custagiis prædictis per curiam hic DE INCREMENTO adjudicatis, quæ quidem DAMNA in toto se attingunt ad, &c* (d). The court had awarded increased costs to a plaintiff, for the delay he had suffered by being hung up by injunction (e); but in the following year the like costs were refused (f).

The mode of trial by law-wager was still open to much discussion. The principal ac-
Wager of law.
 tions in which law-wager was used, were debt and detinue; it was also allowed in accompt, in some instances. A statute had been made in the time of Henry IV. to prevent

(a) Rast. 158.

(b) 8 Hen. VI. 12.

(c) 18 Ed. IV. 23.

(d) Rast. 172.

(e) 21 Ed. IV. 78.

(f) 22 Ed. IV. 37.

defendants being precluded from waging their law, by the suggestions of plaintiffs that the debt arose upon the settlement of an account (*a*). That statute gave the judges an authority to examine the plaintiff's attorney, and other persons, and to allow or refuse, according to their discretions, the wager of law to the defendant. The rule by which the judges chose to govern their discretion was the preamble of the act, which seems to admit, that against an accompt settled before persons not properly and legally auditors, a defendant might wage his law (*b*). We find in the reports of this period many instances of the plaintiff being examined, according to the direction of this act, and several cases where the judges went further than the object of the preamble of the statute.

An action of debt was brought on arrearages of an accompt, upon which the defendant tendered his law, and prayed the plaintiff might be examined: this was done, and it appeared by such examination, that it was a debt upon a contract, and so was no matter of accompt (*c*). Again, it appeared upon examination of a plaintiff, that he had let to the defendant a house and furniture, and at the end of the term they came to accompt before auditors; upon which part of the rent was found to be in arrear, and part of the furniture destroyed; and because he might have debt for the rent, and detain for the furniture, the defendant was allowed to wage his law (*d*). In debt on accompt before auditors, upon examination, it appeared to arise on an award by arbitrators; but these were held not to be auditors, and therefore the defendant was admitted to his law (*e*). These cases were not within the preamble of the statute; but the judges availed themselves of the discretion given them by the enacting clause, and took this summary method of discovering whether the plaintiff had chosen his proper remedy: if not, they permitted the defendant to dis-

(*a*) Vid. ant. 231. (*b*) Vid. ant. (*c*) 8 Hen. VI. 13.

(*d*) 20 Hen. VI. 16. (*e*) 20 Hen. VI. 41.

charge himself by making his law. The only case precisely within the act was the following, where upon examination it turned out that the accompt was not before *auditors*, but in the presence of *one* only, and the defendant was for that reason admitted to his law (a).

If auditors were assigned, and it appeared that there was a surplus due from the lord to his baillee, and the baillee brought debt on arrearages of this accompt, yet the lord might wage his law; for the auditors were by the statute, and, according to the common law, were considered as judges of the baillee only, and not of the lord; and it was upon the idea of the matter having been discussed before competent judges, that a defendant in such case was restrained from making his law (b).

A notion had prevailed that in debt against a person for board and eating, the defendant should not be permitted to wage his law; and after it had been repeatedly decided, generally, that where the party was at liberty to provide or not, the defendant might have this privilege (c), this point was denied by *Prisot* and *Needham* in the latter end of Henry VI's reign (d). However, in a very particular instance, namely, where victuals had been provided by the warden of the Tower for a person imprisoned for treason, the obligation of common humanity was esteemed of such force as to leave the plaintiff without an option, and therefore the defendant was not permitted to wage his law against this meritorious creditor (e). Again, where the boarding was connected with a sort of realty, as where the plaintiff had let a room to a man, and then took him and his wife to his table at so much a week, the defendant was not allowed his law. In the same manner, if land was let with a stock upon it in debt for the rent, law-wager would not be allowed, on account of the stock being coupled with the

(a) 20 Hen. VI. 16. (b) 14 Hen. VI. 24. (c) 22 Hen. VI. 13.
15 Ed. IV. 16. (d) 39 Hen. VI. 18. (e) 28 Hen. VI. 4.

land, though it would lie in debt founded on a lease of the stock only (a).

The above doubt might have arisen from the difference between the common law, as collected from the analogy of other cases, and the custom of London; for it was positively held, that by the custom a defendant could not wage his law, in debt for board: by the same custom a defendant was excluded from this law, if an alderman of London testified the truth of the contract (b).

It was agreed, that where persons were *compelled to serve* by the statutes of labourers, as were ploughmen, shepherds, and all servants in husbandry, and they brought an action for their wages, the defendant should not have his law, because there was no option in the plaintiff whether he would serve or no; and yet it was held, that though a taylor, carpenter, or other artificers, if they departed from their service, were liable to an action under the second chapter of the statute, yet because they were not compellable to serve, they might be deprived of their debt by law-wager (c). No retainer of a servant, but under the compulsory part of the statute of labourers, was to exclude a defendant from law-wager. Upon a similar idea it was, that in an action brought by an attorney of the common-pleas for his fees, *Fortescue* chief-justice held, that the defendant should not wage his law; saying, that the justices could compel him to act as attorney for a suitor, though it was otherwise in inferior courts. But where an action was brought by a serjeant who had been retained for two years, law-wager was allowed; because, said they, notwithstanding he was compellable to be of counsel, yet he was not compellable to be retained so long as for two years (d).

It was now settled, conformably with some opinions in the time of Edward III. (e) that in a general declaration for

(a) 9 Ed. IV. 1. (b) 1 Ed. IV. 5. (c) 38 Hen. VI. 14. 22.

(d) 21 Hen. VI. 4. (e) Vid. ant. 98.

a box of charters, the defendant might wage his law, because they partook of the nature of the box; but where one of them was specially noticed, the defendant, as to that, was obliged to plead to the country; and this had become the established practice (*a*). A new rule had been started in the reign of Edward IV. which allowed law-wager in all cases where the plaintiff did not intitle himself to the land, for then the charter was no more than a mere chattel (*b*); but the former seems to have been the more general distinction.

In detinue, if the bailment was in one county, and the declaration alleged it to be in another, the defendant might wage his law (*c*). There was this difference between detinue and accompt, that in the former, if the bailment was alleged to be by the hands of another, law-wager was allowed the same as if it had been by the hands of the plaintiff himself (*d*), but in accompt it was not allowed; though where it was by the hands of the wife of the plaintiff, they being considered as one person, the law-wager was allowed; the like as between an abbot and one of the same society (*e*).

It was held by many, that, according to the custom of London, if a defendant waged his law, the plaintiff might produce a bill testifying the contract, and that would oust the defendant of his privilege (*f*). But this opinion is directly against a statute made in the reign of Edward III. which expressly declares that a man might wage his law against a Londoner's papers (*g*). Law wager was allowed in debt upon an arbitrement (*h*), but was denied in debt, on a recovery in court of ancient demesne (*i*), and for an amercement in a leet (*k*). An infant was not permitted to wage his law (*l*). Executors, when charged as such, could not wage their law, because no man could wage his law

(*a*) 19 Hen. VI. 9. 22 Ed. IV. 7. (*b*) 8 Ed. IV. 3. (*c*) 21 Hen. VI. 35. (*d*) 8 Hen. VI. 10. (*e*) 15 Ed. IV. 16. 10 Ed. IV. 5.
 (*f*) 39 Hen. VI. 34. (*g*) Vid. ant. vol. II. 448. (*h*) 33 Hen. VI. 4. (*i*) 34 Hen. VI. 64. (*k*) 10 Hen. VI. 7. (*l*) 11 Hen. VI. 40.

but upon a contract of his own: they could not therefore be charged on a bailment to their testator, but might yet be liable to an action on their *possession* of goods that had been bailed to their testator, and in such case they might wage their law (*a*). It had been held, contrary to an opinion in the time of Henry V. that a defendant might wage his law against a *quo minus* in the exchequer (*b*): this violated the rule laid down in an earlier period (*c*), that no man should wage his law against the king; and it was on that account over-ruled by the practice of later times.

Of protection. Protections were a greater source of delay to justice than even essoins; for a protection might be cast where an essoin could not, and besides had the sanction of the great seal to back it; while an essoin, being only the surmise of the party, was open to cavil and rejection. Thus a protection might be cast by a person who was in prison, or let to mainprise, but such a one could not cast an essoin (*d*). It might be cast at *nisi prius*, which an essoin could not (*e*). Protections stood upon the ground of decisions before mentioned to be made in the reign of Edward III. and the alterations introduced by the late statutes (*f*). They were of two kinds, namely, *quia profecturus*, and *quia moraturus*: they were for a year only, and were disallowed in *quare impedit*, assise, attain, dower *unde nihil*, darrein presentment, and certain other pleas before justices in eyre; and a protection that was offered in any of such cases would not be allowed (*g*).

The effect of a protection was to put the plea *sine die* for a year, and the common manœuvre was to cast it at *nisi prius*. In such a case the entry would be thus: *Postea continuato inde processu*, &c. mentioning the respite of the jury, and the appearance of the parties *in banco*; after which

(*a*) 3 Hen. VI. 38. (*b*) 32 Hen. VI. 24. (*c*) Vid. ant. (*d*) 9 Hen. VI. 58. 38. Hen. VI. 23. (*e*) 9 Hen. VI. 55. (*f*) Vid. ant. 98. (*g*) 39 Hen. VI. 39.

it might go on, *Et super hoc loquela prædicta remanet sine die, eò quòd idem A. in obsequio domini regis in guerris domini regis in partibus transmarinis profecturus est* (or as the case might be) *moraturus est. Et habet literas domini regis de protectione patentes, quarum datum, &c. per unum annum tunc proximè sequendum duraturas, &c* (a). The justices of *nisi prius* had no power to allow or disallow the protection, but were merely to discharge the jury, and make a return of the protection, which was allowed or disallowed at the day in bank. If the inquest was taken after the protection cast, it was void. It often happened at the day in bank, that the plaintiff would present to the justices an *innotescimus* to repeal the protection; upon which there would issue a re-summons, or re-attachment against the defendant, and a new *venire*, or new *distringas*, (for after much variety either practice was held good) (b) to try the issue. The discharge, however, of the jury at *nisi prius* was still right, as the protection was good till repealed: so, if it expired before the day in bank (c); but if it was disallowed on the day in bank, it was otherwise, for then it was the same as none (d). Sometimes the defendant would make default at *nisi prius*, and not cast his protection till the day in bank, when it might be allowed; and if the inquest had been taken by default, the default would be saved (e). Where a defendant appeared and challenged some jurors, and cast a protection, it was disallowed; because as he had appeared he could not be demanded, and a protection was to excuse a default (f).

It was a rule where there was more than one defendant, that a protection cast by one, whether before appearance or after, should put the parol *sine die* for all (g). But if the plaintiff had the precaution to sue several *venires*, then a protection cast by one defendant at *nisi prius*, or in bank,

(a) Rast. 453. (b) 5 Ed. IV. 2. Bro. Prot. 69. (c) 35 Hen. VI. 58. (d) 21 Hen. VI. 20. (e) 21 Hen. VI. 10. Bro. Prot. 50. (f) 4 Hen. VI. 22. (g) 21 Hen. VI. 41.

would stand only for that one (a). A protection could only serve a defendant; and even a defendant in replevin, if he avowed, and so made himself an actor, could not have a protection (b). It was argued at one time, that a *garnishee*, after plea pleaded, when he made title to a deed, was an actor, and therefore should not have a protection (c). There is a case of a *garnishee*, even after plea pleaded, casting a protection (d); but the former seems the better opinion (e). It was held, he might cast a protection to the *scire facias*, because then, at least, he was not an actor (f). A *vouchee* and *prayer* in aid were held intitled to cast a protection to the writ of summons, upon the ground that they might have an *essoyn*, and were liable to judgment by default (g). But where *resceit* was counterpleaded, the *prayer* was not allowed to cast a protection, because he was no party to the suit till he was received (h).

Besides the substantial requisites to constitute a legal protection before-mentioned, it was likewise not to vary (i) from the original writ, by containing more or less (k); it was not to be dated since the time of the default to be saved (l); in either of which cases it would be disallowed. A corporation could not have a protection, because they could not be supposed to be all in *servitio regis* (m).

The criminal law. The criminal law received some impression from the decisions of courts during these two reigns. What is laid down by *Newton* in the 19 Hen. VI. (n) as the law of treason militates so plainly with the statute of treasons, that it can hardly be taken to be the better opinion of lawyers in his time. He says, that if a man imagined the death of the king or his consort, he should

(a) 22 Hen. VI. 3. (b) 22 Hen. VI. 28. (c) 3 Hen. VI. 18.
 (d) 4 Hen. VI. 9. (e) 9 Hen. VI. 36. (f) 3 Hen. VI. 18. (g) 3
 Hen. VI. 30. (h) 37 Hen. VI. 2. (i) 7 Hen. VI. 22. (k) 23
 Hen. VI. 1. 4 Hen. VI. 22. (l) 21 Hen. VI. 10. (m) 21 Ed.
 IV. 79. (n) Litt. 47.

be put to death for such an imagination, without having done any thing, that is, without any overt act. Perhaps the slight circumstances that were construed *overt acts* of treason might in some measure justify the above opinion. More consonant to our present ideas was the opinion of the judges, when they determined in the reign of Edward IV. that treason committed against Henry VI. should be punished, though that prince was stigmatized with the appellation of Usurper (*a*). The changeableness of public affairs made it the interest of every successive monarch to guard against conclusions that might affect the security of the present possessor of the throne. By a statute of Edward II. (*b*) no one was to be construed guilty of felony for breaking prison, unless the crime for which he was committed was felony. This act does not seem to be violated by a determination in the beginning of the reign of Henry VI. where a person outlawed for felony was imprisoned in the king's bench; and being afterwards indicted for breaking prison, knowing certain traitors to be there confined, and letting them go at large, he was adjudged guilty of treason, and accordingly drawn and hanged (*c*).

Where a man had killed the wife of his master, there was some argument whether this was a petit treason within the statute; and after considering some cases that have been mentioned in the reign of Edward III. (*d*) it was agreed by the justices of both benches to be treason (*e*). Some years after a woman was burnt, because she, in confederacy with two others, had murdered her husband; this being also deemed a petit treason (*f*).

We find the ideas of Bracton, and indeed those of sound sense, confirmed in some opinions delivered on cases of homicide (*g*). If I am cutting down my tree, and it falls on a man and kills him; or if I am shooting, and my bow

(*a*) 9 Ed. IV. 12. (*b*) Vid. ant. vol. II. 290. (*c*) 1 Hen. VI. 5. b.
(*d*) Vid. ant. 117, 118. (*e*) 19 Hen. VI. 47. b. (*f*) 1 Ric. III. 4.
(*g*) Vid. ant. vol. II. 10.

starts aside, and I kill a man; neither of these, says the book, is felony: for felony must be with malice prepense; and what happens against a man's will, cannot be said to be done *animo felonico* (a). It was equally agreeable with the old law, to denounce the pains of felony against any who took away the life of an attainted man, otherwise than by the forms of law (b). It was held a good justification in an appeal of death to say, that the deceased appealed the prisoner of treason in the court of the constable and marshal, and they waged battel thereon, and so he killed him (c).

In the reign of Edward IV. some cases of Larceny. larceny happened, which created such discussions as laid open the learning upon that subject very fully. A man was indicted for feloniously taking and carrying away a box with charters in it: and there it was said, that it was no felony, because charters are *realty*, and not chattels real; and this was proved by a felon forfeiting his chattels real; under which description go a term for years, or a guardianship, but not his charters; to which all the judges assembled in the exchequer-chamber assented; and in that case the box was adjudged to follow the nature of the charters. It was at the same time laid down for law, first, that larceny could only be committed of *chattels personal*; and secondly, in respect of the sort of *taking* necessary to constitute larceny, it was held, that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession (d).

A case somewhat allied to this last, was debated afterwards with great anxiety in the star-chamber, before the council, in the 13th year of the same reign. One had bargained with a man to carry certain parcels of goods to Southampton. The man took the parcels, carried them to

(a) 6 Ed. IV. 7. b.

(b) 35 Hen. VI. 58. Vid. ant. vol. II. 10.

(c) 37 Hen. VI. 20, 21.

(d) 10 Ed. IV. 14. This case was in one of the Terms that were stiled 49 Hen. VI. that monarch being raised again to the throne for a few months.

another place, broke them open, took out the goods, and converted them to his own use. Whether this was in law a larceny, was debated with much difference of opinion. It was argued, that a possession of the goods was given by the bailment of the owner; and neither felony nor trespass could be committed of them by the bailee; for he could not be said to take them *vi et armis*, & *contra pacem*. On the other side it was said, that a man's act becomes felony or trespass according to the intent. If a man abuses a distress, he is a trespassor, and so here all confidence implied in the bailment was superseded by the taking, which discovered his intent to have been bad from the beginning. It was also said, that this was different from a bailment; for it was only a *bargain to carry*; and what followed shews that this was only a pretence to gain an opportunity for stealing. At length, one of the justices had recourse to a refinement which admitted some of the above reasoning, but exempted this case from the conclusion following upon it. He admitted, that a man who has the possession of goods by bailment, cannot commit felony of them; but here, he said, the *goods* within the parcels were *not* bailed to the carrier, but the *parcels themselves*; and therefore taking *them* was not felony: but when he broke them open, and took out the *goods*, he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for instance, if you deliver a tun of wine to a carrier, and he sells it, this is neither felony nor trespass; but if he takes any out of the tun, and sells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes any thing out of it, this is felony. The reason to support these cases was, that the things not specifically and expressly delivered were not in truth bailed, and therefore the party, in *taking* them, intermeddled where he had no trust.

These were the arguments used before the council:

the case was afterwards adjourned into the exchequer-chamber, and the opinion of all the judges was taken. There it was agreed by all the judges, except one, that generally where goods were bailed to another, he could not take them feloniously. They held also, that when a possession so obtained had once determined, then the baillee might commit felony in taking them; as, if I bail goods to a man to carry them to my house, which he performs, and afterwards takes them, it is felony; because his possession under the bailment ceased when he delivered them at the house. They agreed some points upon the nature of possession. If a guest in an inn takes a cup, he is a felon, because he had not properly a possession, but only the use of it while there. The same of a cook or butler; they are only ministers as to the things within their care; but have no possession, which, in these cases, is always construed by law to be in the master. But it would be different, perhaps, says the book, if goods were *bailed* to a servant; for as they then would be in the actual possession of such servant, he could not commit felony of them.

After all, as to the principal case, whether it was agreed, that the bailment ceased upon breaking the parcels open, and the carrier thereby forfeited the legal privileges annexed to him as baillee, and in so taking the goods he was considered as a common person; or whether it was upon the whole thought, that this was not a bailment, but merely a bargain to carry; it is not stated in the report upon which of these grounds they determined; but it was certified to the chancellor by the major part of the justices, that this man was guilty of felony (*a*).

It was in a few instances defined what kind of property was subject to larceny. Fish in a pond, as well as in a trunk, young goshawks, and pigeons which could not yet fly, and so were at the will and controul of the owner; to steal

(*a*) 13 Ed. IV. 9, 10.

any of these was construed to be larceny; but otherwise of the same animals when full grown, and therefore in a great measure at liberty (a). In short, it was held, that only such things in which a man had a *property* could be feloniously taken and carried away (b).

The old maxim of our criminal law, that *voluntas reputabitur pro facto*, continued to prevail in the reign of Henry IV. For then *Shard* agreed with *Gascoigne*, that if a man was indicted for that *il gisoit deprædando*, it was felony: Thus, says he, if a man comes to rob me, and I am stronger than he, and overcome him, yet is he guilty of felony (c). But this opinion now began to grow obsolete; for in 9 Edward IV. we find a contrary language. There *Jenny* says, that if one lies in wait in the road, with his sword drawn, to set upon a person, and demands his money, and a hue and cry is levied, and the man is taken, yet it is *not* felony (d). This was the ruling opinion upon which the law began to settle; and men were no longer punished for crimes which they only meditated, but had not actually committed.

The rule which had long been followed, that the accessory should not be put to answer till the principal was attainted, was not found sufficient to secure a just administration of justice. It happened in the 18 Edward IV. (e) that two were indicted, one as principal, and the other as accessory; the principal was outlawed, but the accessory being taken, was indicted, and pleading not guilty, was convicted and hanged. After this the principal reversed the outlawry, and upon arraignment was acquitted of the fact, and discharged. Thus another rule of law was violated, namely, that where the principal was innocent, the accessory could not be guilty. It seems the first rule was too general, and ought to be confined to an attainder upon

(a) 18 Ed. IV. 8. (b) 22 Hen. VI. 59. Bro. Coron. 190. (c) 13 Hen. IV. 85. (d) 9 Ed. IV. 28. (e) Litt. 9.

the fact, and not otherwise; especially when it was laid down that the accessory should not be permitted to avail himself of any error in the outlawry, which was suffered to stand in force against him, till reversed by the principal (*a*) in a writ of error.

Some points arose on the mode of proceeding by appeal. The appeal of death was the action of the heir to the deceased. A case of a peculiar kind was stated by *Thirning* in the reign of Henry IV. where the heir was within age, and died, and was succeeded by several heirs within age: it was said by that judge, that the last of these persons should have the appeal; but *Gascoigne* was clearly of another opinion (*b*). A case happened in the reign of Henry VI. which brought forward this point again; for there a man was outlawed, and having a pardon he sued a *scire facias* against the plaintiff, who was returned dead by the sheriff; and after much argument, it was determined by the court, that no *scire facias* should go against the heir; which seems like a decision, that the heir was not intitled to the appeal (*c*). The son, as heir to his mother, might bring an appeal against his father of the death of his mother (*d*), he being as much heir to one as to the other.

Perhaps this decision is not to be extended beyond its own circumstances, namely, of an appeal once commenced, and that the opinion delivered on the former occasion was that which governed; for we find a curious point in the law of descent as to appeals much argued at this time, as if the principal proposition was fully settled: this point was, whether a person who derived his descent through a female could intitle himself to an appeal as heir. A case of this sort was brought into the exchequer-chamber in the 20 Hen. VI. when *Fortescue*, chief justice, declared that he and his brethren were agreed upon the matter, but were willing to hear what could be said on it. The objection

(*a*) 2 Ric. III. 21.

(*b*) 11 Hen. IV. 11.

(*c*) 38 Hen. VI. 13.

(*d*) 18 Ed. IV. 1.

against such an appeal was founded on the express words of *Magna Charta* (a), that no one should be taken or imprisoned on the appeal of a woman, except for the death of her husband: the woman not being enabled to maintain an appeal, it was argued that an ancestral action like this, having never descended on the woman, could not descend through her to the appellant. Thus where land was given in tail male, and the donee had issue a son, who had issue a daughter, and she had issue a son, the great-grandson could not convey a title *per formam doni* through the granddaughter. Upon this reasoning the justices determined that the appeal would not lie (b).

However, this was not considered as a decision which should close the question; for in 17 Edward IV. (c) the following case was depending in the exchequer-chamber: A woman had a son who was murdered, leaving no heir on the part of the father; and the doubt was, whether the uncle on the part of the mother should have an appeal: and there *Billing*, the chief-justice of the king's bench, with *Needham* and *Choke*, were of opinion against the appeal, relying upon the prohibition of *Magna Charta*. But *Brian*, *Nele*, *Littleton*, and the chief baron, were for it; and in opposition to the above reasoning they held, that the uncle *ex parte patris* might, beyond a doubt, have an appeal of the death of his nephew, though the father, through whom he made his conveyance, could not. It does not appear what the decision was on this occasion, though the authority seems to be in favour of the latter opinion.

It was held by some, that if a woman married pending an appeal, she might pray judgment; but that she could not institute such a suit together with her husband (d). It was an established rule that an appeal should be prosecuted in person, and not by attorney; therefore where a

(a) Vid. ant. vol. I. 251. (b) 20 Hen. VI. 43. (c) 1.
(d) 21 Ed. IV. 72, 73.

woman was confined by pregnancy during an appeal in which the defendant was attainted, and the woman's appearance was recorded for that term, yet the better opinion was, that she could not pray judgment and execution by her counsel. But to facilitate the progress of the prosecution, the book says, that one of the justices rode to Islington to see whether she was alive, and whether she would pray execution; which she did, and the man was hanged (a).

It was usual in pleading any special matter in an appeal, to go on and add, *that as to the felony he says he is not guilty*. A defendant pleaded that the plaintiff had an elder brother, who was intitled to the action in preference to the appellant: it was the opinion of *Markham*, that in this case he need not plead over to the felony, nor in any other case, except where the plea, as a release, confessed that the plaintiff had once a title of appeal; but if it was such matter as shewed the plaintiff never to have had a right of action, as bastardy, *ne unque accouple*, and the like, there he ought. It was, however, the opinion of the serjeants, that the defendant, *in favorem vitæ*, ought always to plead over to the felony (b); and that seemed to be the better practice; so that the jury might try the second issue, if the first was found against the prisoner, who would otherwise rest his life upon one issue, which, if found against him, would be equal to a conviction on the principal fact of the appeal (c). Others, however, held, that after the bishop had certified against the prisoner, yet the felony might be afterwards pleaded to and tried (d).

In an appeal one defendant could not plead a release to another, as one defendant in trespass was allowed to do (e). If an appeal was depending in the king's bench, and the issue was in a foreign county, it used to be tried by *nisi prius*; but as the justices had in this case no other autho-

(a) 21 Ed. IV. 72, 73.

(b) 7 Ed. IV.

(c) 22 Ed. IV. 39.

(d) 14 Ed. IV. 7.

(e) 21 Ed. IV. 71. 2 Ric. III. 9.

urity than to try the issue, they could not, as in an original appeal commenced before them, arraign the prisoner at the suit of the king, on default of the appellant (*a*). It was a check upon this vindictive action, that appellants used to be sworn to the truth of their appeal (*b*). It was now a settled course in appeals, if a defendant was charged with more than one felony, to arraign him upon all, one after the other, in order to procure for each appellant (*c*) a restitution of the things stolen; a practice which had been indulged in the reign of Edward III. in a particular way (*d*). In such cases it was, however, always usual for the jury to find that the appellant had made fresh suit, and then the course was to sue out a writ of restitution of the goods stolen (*e*). It was agreed and adjudged, that in an appeal of felony a peer had not his privilege as on an indictment, but must be tried as a common person (*f*). There was this difference between an indictment and an appeal, that on the former the prisoner was not allowed counsel, except to matters of law, but he had every use of counsel in the latter (*g*).

Very little alteration happened in the ideas ^{Of provors.} upon which provors were admitted to appeal.

The statute of Hen. IV. (*h*) had discountenanced this mode of proceeding, and gave a warrant to the courts to go on in discouraging such suspicious accusers. In the 19 Hen. VI. a man being indicted of robbery in the king's bench, confessed the felony, and appealed two men of the same fact. Process was issued against one of them, the other came to the bar, and joined battel with the provor. A day was given them at *Tothill*, where they fought, and the appellee was worsted, and severely wounded in the head. Upon this the justices ordered him to be brought before them, and they demanded of him if he would have *any more of the battel*; to which he answered that he neither

(*a*) 22 Ed. IV. 19. (*b*) 7 Ed. IV. 27. (*c*) 4 Ed. IV. 11. (*d*) Vid. ant. 128, 129. (*e*) 4 Ed. IV. 11. (*f*) 10 Ed. IV. 6. (*g*) 9 Ed. IV. 2. (*h*) Vid. ant. 239.

would nor could; adding, upon the oath which he had taken, that he was not guilty of the crime wherewith he was charged. Upon this the justices said, that if he would have any more of the battel, he should be put in the same situation he was in before they sent for him; but he still persisted in declining it; and it was therefore adjudged that he should be hanged instantly, which was accordingly executed at *Tyburn*. After this the other appellee came in and pleaded not guilty. Then judgment was given against the provor also to be hanged; for whether he who now pleaded not guilty was acquitted or attainted, the provor, says the book, ought to be hanged on his own confession of the felony; and accordingly execution was instantly done upon him (a). It was laid down, that the appeal of a provor was for the benefit of the king, and not of himself; and that it was in the election of the justices to admit the appeal, and award process against the appellees, or to direct the provor to be hanged on his own confession (b). This was putting it nearly upon the footing of that courtesy, which in modern times has been indulged towards offenders, who will consent to give evidence for the crown against their accomplices.

In the 14th of Edw. IV. there is a judgment of penance, agreeing in substance with that before stated in the reign of Henry IV. (c) which seems to have continued as the regular mode of inflicting such punishment upon obstinate felons (d). We find a case that happened before *Danby*, chief-justice of the common-pleas, where a felon, upon pleading not guilty, and being asked how he would acquit himself, that is, in modern language, how he would be tried, answered, *per Dieu, et notre dame Marie, et per saint eglise*. But it was recommended to him by the judge to plead in the common form, that is, to put himself

(a) 19 Hen. VI. 35. (b) 21 Hen. VI. 28, 34. (c) Vid. ant. 250,

(d) 14 Ed. IV. 8.

upon *the country*, or he would be put to the penance (a); the pleading not guilty, and the putting himself upon the trial *per Dieu*, without adding *per patriam*, being within the express provision of the statute of Westminster (b).

The trial by battel, in criminal cases, though still warranted by the law and practice of our courts, was subject to such exceptions as frequently prevented its taking place (c). It had long been agreed, that where a felon was taken with the manner, where the appellant was maimed, or above sixty years of age, or an infant, the defendant should not be permitted to try the fact in a way so hazardous to the personal safety of the prosecutor: but of late, an additional exception, or counter-plea, to the battel had been admitted, which could be applied in all cases; namely, that an indictment was depending for the same fact (d). This being now a common mode of proceeding, the prisoner had rarely an opportunity of forcing the appellant to this barbarous decision: however, if an indictment was insufficient, it would not answer the above purpose. It was now held, that in an appeal of treason, the battel must be before the constable and marshal, and not elsewhere; and it was so laid down by *Prisot*, chief-justice, and *Needham*, one of the justices (e). It followed of course, that an appeal of treason could be brought in that court only, and not elsewhere.

It had been settled in the reign of Edward III. that a felon who challenged 36 jurors peremptorily, should be treated as one who refused the law (f); but it was agreed in the reign of Henry V. that a felon might in an appeal challenge 35 jurors (g). It happened that a prisoner arraigned for coining challenged 31 jurors, and the jury remained *pro defectu juratorum*. Two days after 40 tales

(a) 4 Ed. IV. 11. (b) Vid. ant. vol. II. 134, 135. (c) Vid. ant. vol. II. 135. (d) 22 Ed. IV. 19. (e) 37 Hen. VI. 20. (f) Vid. ant. 136. (g) 9 Hen. V. 7.

were returned, but the prisoner stood mute; upon which a jury of twelve was charged with him, and he was found guilty and hanged (*a*). The reason assigned for this measure was, that he had before pleaded not guilty; to which might be added, that he had put himself upon the country, and therefore was not within the stat. Westm. 2. and that by his silence he had waved the challenges. Where eight jurors had been sworn, and there was a default of jurors, at another day the prisoner was suffered to challenge those already sworn, for want of freehold (*b*). The old common-law challenge to a juror because he was one of the indicators, which had been confirmed by a statute of Edward III. (*c*) was qualified by a distinction that was now made between felony and trespass: it was said to be a good challenge in felony, but not in trespass; though it must be remembered, that the statute speaks both of trespass and felony (*d*).

There had been great difference of opinion, whether the plea of sanctuary should be allowed to a person who had abjured or was attainted: the more modern opinion seems to have been, that an attainted person could not claim that privilege (*e*). There was not less debate as to the granting of clergy: it seemed in the time of Edward III. to depend almost wholly on the ordinary demanding the felon as a clerk (*f*). In the reign of Edward IV. when an ordinary refused a man who prayed his clergy and read, the matter was certified into the king's bench, and the ordinary was fined; under the idea that he was only a minister of the court, and not the judge, in such case (*g*). Again, one who had abjured for felony in killing a man being taken, prayed his clergy: it happened in that case, that the man could read only two or three words here and there, and not any three words together, and yet the ordinary was

(*a*) 15 Ed. IV. 33. (*b*) 32 Hen. VI. 26. (*c*) Vid. ant. vol. II. 459, 460; and ant. 135, 136. (*d*) 7 Ed. IV. 4. (*e*) 9 Ed. IV. 28. Vid. 8 Henry IV. (*f*) Vid. ant. 138. (*g*) 7 Ed. IV. 29.

pleased to claim him as a clerk; upon which it was observed by the whole court, that if it appeared to them that the prisoner could not read, the ordinary should be heavily fined, and the convict be hanged; adding, that they were the judges of his reading, for they were to make the record, *quòd legit ut clericus, ideo tradatur ordinario*: they further said, that an ordinary should be fined as well for refusing a clerk who could read, as for claiming one who could not.

It was at the same time intimated, that the reading need not be so very perfect and accurate as was pretended; for a felon being tried by *Fortescue*, and not being able to read, but only to spell, and so put syllables together, was nevertheless allowed his clergy. The power and effect of the ordinary's refusal was laid down by *Littleton* with this distinction, that if a clerk was refused *generally*, he should be hanged; but if a *cause* was stated, and that was such as could not be allowed by the law of the land, namely, that he had not the *tonsura clericalis*, or *ornamentum clericale*, or the like, in such case the ordinary should be fined, and enjoined to receive the felon (*a*). It was probably upon this distinction, that, some few years afterwards, a felon who could read sufficiently, but was refused by the ordinary, was hanged (*b*).

It had been the common course for pri- Of clergy.
soners to claim the benefit of their clergy
upon the arraignment: this was thought prejudicial to the party, for he had no challenge to the inquest *ex officio*, *ut sciatur qualis ordinario liberari debeat*, by which conviction, nevertheless, he forfeited his goods and chattels, together with the profits of his lands, until he had made purgation. To remedy this, Sir *John Prisot*, chief-justice of the common-pleas, in concert with the other judges, in the reign of Henry VI. made an alteration, which was

(*a*) 9 Ed. IV. 28.

(*b*) 21 Ed. IV. 21.

thought more advantageous to prisoners than the old practice. This was, not to allow the benefit of clergy upon the arraignment, but to recommend to the prisoner to plead to the felony, and put himself on the jury *de bono et malo*: thus he had the advantage of his challenges, and the chance of an acquittal on the merits; and after all if convicted, he might still claim his clergy. This was a variation in the practice of our criminal courts which was greatly commended, and was followed by most of his successors (a).

(a) 2 Inst. 164.

CHAP. XXIII.

HENRY VI. EDWARD IV.

Of Pleading—The Declaration—The Defence—Of Argumentative Pleading—A Traverse—A Negative Pregnant—Of Double Pleading—A Protestation—Departure in Pleading—Colour in Pleading—Aid Prayer—Of Garnishment—Of Interpleader—Plea of hors de son Fee—Of Nontenure—Of Jointenancy—De son Tort Demesne—Summons and Severance—Forms of Pleading—Of Demurrer—Of Jeofaile and Amendment—Of Repleader.

THE science of pleading makes a distinguished feature in the learning of this period, particularly of the last twenty years of Henry VI. and the reign of Edward IV. Whatever industry and whatever ingenuity had been exercised in the reign of Edward III. in adjusting the constitution and conduct of real actions, seems to have been transferred to pleading; which succeeded, as it were, to that ancient branch of learning like a descendant of the same family. Every thing which concerned the frame and proceedings of actions was now agitated, and refined upon, with the greatest dexterity and skill. The writ, the declaration, the consequent pleadings, the process, the judgment; all these were debated under every possible consideration, and the forms and course of them were settled upon solemn deliberation.

Pleading had become so much the fashionable study, and it constituted such an essential part of the qualifications of a lawyer, that *Littleton*, in the reign of Edward IV. declares it to be "one of the most honourable, laudable, and profitable things in the law, to have the science of well pleading in actions real and personal;" and therefore he advises his son "especially to employ his courage and care to learn it (a)." The reports of the time of Henry VI. and Edward IV. are full of points of pleading, which are started in one shape or other, in almost every question debated in court. Pleading was cultivated with so much industry and skill, that it was raised to a sudden perfection in the course of a few years.

In the former parts of this History, frequent occasion has been given to speak upon the nature of pleading in different actions, and the reader is not unapprised of the progress made in this branch of our law. But this retrospect will hardly satisfy the curiosity of the historical inquirer, when he is arrived at a period in which pleading was brought to a state of consistency and accuracy that has entitled it, in the language of lawyers, to the name of a science. Almost every thing substantial in pleading, which was practised from this time down to the present, was settled by judicial determinations in the reigns of these kings. The precedents of this period became ever after the standards of good pleading, and the rules and maxims of pleading now settled, have governed ever since in our courts. It seems therefore proper to inquire what these precedents and what these rules and maxims were; in order to which we shall take a view of pleading in general, confining our observations to such formal parts as apply to most actions, whether real, personal, or mixt.

The whole of pleading was so much a matter of form, that it may appear strange to distinguish any by calling

(a) Litt. sect. 534.

them formal parts; but the forms of pleadings seem to be of two kinds. Thus, there are the forms of commencing and concluding a declaration, or plea; the form of a traverse, of a protestation, of giving colour, and the like. These are the same, whatever is the substance and matter of the declaration, plea, traverse, protestation, or colour, and are properly and emphatically matters of form. But there is also a form in stating the substance of a declaration or plea: thus, a bond, a fine, a lease, a record, all have due forms, in which, and in no other, they ought to be pleaded. Such formal parts therefore, whether of the former or latter kind, as were now settled, and had grown into common use, are the objects of our present consideration, without entering into such matters as might, by possibility, be made the substance of a declaration or plea; those being as infinite as the causes of action, and grounds of defence, that might arise upon the various modifications of rights, whether of property or persons, in the law of England.

The first part of pleading that naturally pre-^{The declara-}sents itself is the count, or declaration. ^{tion.} The declarations which were laid before the reader in the reign of Edward III. (a) seem to differ, in form, from those that had grown now to be in use. The first difference which strikes us is, that they were now no longer in French, but seem, in the first instance, to have been put into such Latin form and stile as the entry on the roll was finally to be; the consequence of which was likewise this, that instead of being in the first person, the counting part, like the writ, was now in the third. Another alteration was, that the writ was invariably recited in the count, and made a necessary part of it. The count, or declaration, was therefore the same as the roll or record of the court down to the production of the *secta*, suit. In like manner, the plea

(a) Vid. ant. 59, &c.

began with a recital of the defendant's appearance, and then stated his defence and plea in the third person; and this plea constituted, in like manner, the following part of the roll or record of the court: the same of the replication and subsequent pleadings.

The following is a specimen of a declaration in an action of debt, according to the practice now established: *B. &c. summonitus fuit ad respondendum A. de placito quòd reddat eidem A. 20l. quas ei debet, et injustè detinet. Et unde idem A. per C. attornatum dicit, quòd cùm prædictus B. tali die et anno, &c. apud S. computasset cum eodem A. de diversis denariorum summis ipsius A. per præfatum B. ad compotum inde eidem A. cùm inde requisitus fuisset, reddendum, ante id tempus receptis, et super compoto illo prædictus B. inventus fuisset in arreragiis erga ipsum A. in 20l. per quod actio accrevit eidem A. ad exigendum et habendum de præfato B. prædictas 20l.: idem tamen B. licèt sæpiùs requisitus, prædictas 20l. eidem A. nondum reddidit, sed illas ei hucusq; reddere contradixit, et adhuc contradicit; unde dicit quòd deterioratus est, et damnum habet ad valentiam 40s. &c. et inde producit sectam, &c (a).*

Such was the form of the declaration; but whether it was drawn out in this form on paper or parchment by the party's counsel, and delivered over to the adversary's counsel, or, what is more probable, was entered, in the first instance, upon the roll of the court, it is not easy to determine with precision: in point of effect, it would be the same; for the roll might be amended by the leave of the justices, during the term in which the declaration or plea was entered, and it must, at any rate, be entered on the roll as of that term; in both which cases the roll became

(a) Rast. 147. Whenever it is necessary to illustrate what is here said on the doctrine of pleading, we shall make use of Rastell's Entries; most of the records in that collection being of the period of which we are now speaking.

afterwards, in construction of law, a record : so that the power the justices exercised over the roll during the term is, on one hand, sufficient to shew the possibility of making the amendment of pleas without resorting to the supposition of there being paper-pleadings ; and the different construction the judges put upon the same roll of parchment, after and during the term, satisfies us, that to constitute a record, there was not required a transcript from any less solemn paper or parchment, to one that was more so. If we were to judge from the reports of this period, in which there is frequent mention of the roll, with the above distinction of the same parchment being a roll in the term, and a record afterwards, without any allusion that could induce one to suspect the pleadings were, in any stage, to be sought for elsewhere, we cannot help adopting the above opinion ; which likewise seems to be rendered more probable, when it is considered, that neither paper nor parchment was then an article to be consumed so profusely as now-a-days, in multiplying copies of the transitory nature these must have been.

It seems therefore a reasonable conjecture, that whenever pleading *ore tenus* went out of use, it became the practice for the council to enter the declaration or plea upon the roll, in the office of the prothonotary ; that the counsel of the other party had access to it, in order to concert his plea, or take his exceptions to it ; and that, when these were to be argued, the roll was brought into court, as the only evidence of the pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and handing this paper from one party to the other, the entry on the roll being deferred till the end of the term ; an improvment which greatly facilitated the perusal and correction of pleadings, both of the party and his adversary, and made the affair of amendments more easy and decorous than in the old method, which must deface

the roll. But this could not be indulged, till a period arrived in which so useful a commodity as paper was become cheaper and more common; and after all it must be confessed, whatever advantage might be attained by the convenience of paper-pleadings, the old method had simplicity to recommend it; for the declaration or plea, when once entered on the roll, answered all the purposes of paper-pleading during the term, and of a record afterwards.

To return to the declaration, and its form. As the declaration was to set out with a recital of the original writ, it is plain, that where the writ was to attach the defendant, it should begin, *B. attachiatus fuit ad respondendum, &c.* The general rule for framing a declaration was, that after setting forth the nature of the action, as was done by the recital of the writ, it should state the time and place, and the cause of action; in which should be comprehended how, and in what manner, the action accrued; and, lastly, the conclusion, in which the plaintiff averred his damage, and offered to prove his suit. Respecting the degree of accuracy with which all this should be stated, it was a rule, founded on stat. 36 Ed. III. c. 15. (a), that a declaration should not abate for want of form, so as it had matter of substance, nor should it abate for surplusage (b). In mixt and real actions, the plaintiff was not to count of the day, year, and place, as in personal actions (c). If there was any defect in the declaration, the writ likewise, as well as the declaration, was abated (d).

The plea of the tenant or defendant begun
Defence. with the *defence*, which varied according to the nature of the action or the plea; that is, whether it was first to the jurisdiction, next to the person, then to the count, and then to the writ, all which were called pleas in abatement; or, lastly, to the action, which was called a plea in bar.

(a) Vid. ant. vol. II. 450. (b) 9 Hen. VI. 25. (c) 9 Hen. VI. 115. 16.

(d) 35 Hen. VI. 40.

Thus in some actions, as in assise, dower, *darrein presentment*, *mortauncestor*, *per quæ servitia*, *attaint*, and *scire facias*, the defence was, *venit et dicit*. In others, as in every writ of *præcipe quòd reddat*, of intrusion, *ayel*, *escheat*, and the like, the defence was, *venit et defendit jus suum quando, &c.* In others it was, *venit et defendit vim et injuriam quando, &c.* as in debt, *accompt*, *detinue*, *covenant*, *trespass*, *trespass upon the case*, *ejectment*, *ne injustè veres*, *partition*, *quare impedit*, *quo jure*, *replevin*, *rescous*, *recaptione averiorum*, *parco fracto*, *recto*, *rationabili parte bonorum*, *rationabilibus estoveriis*, actions of debt or trespass given by statute, actions of waste, and other personal and mixt actions. In other actions the defence was more special: thus in a writ of right *quando dominus remisit curiam* the defence was, *venit et defendit jus prædicti petentis et seisinam suam quando, &c.* Again, in the writ *de nativo habendo* the defence was, *venit et defendit jus suum et omnem nativitatem quando, &c.* In others it was still more special; as in a prohibition upon the statutes of Richard II. and Henry IV. it was, *venit et defendit vim et injuriam quando, &c. et omnem contemptum, et quicquid, &c.*: the same in actions upon the statutes of maintenance and labourers (a). Those defences, however, that were most special, were much contracted from the form of defences in the reign of Henry III. when it was usual to set forth *verbatim* the remaining part of the defence, which now was signified by the *et cætera*.

The foregoing were called *full defences*, to distinguish them from a *half defence*, which consisted in closing the defence without adding the words *quando, &c.* Thus in pleas to the jurisdiction, or to the person, the defendant could only make a half defence; for if he added the words *quando, &c.* the jurisdiction and ability of the person would be thereby admitted (b). Again, a misnomer was to be pleaded before any defence at all (c).

(a) Vid. Bro. Defence.

(b) 2 Ed. IV. 15. 40 Ed. III. 36.

(c) Bro. Defence.

After the substance of the plea was stated, the next point was to conclude it in proper form. Thus it was to conclude either to the jurisdiction, to the writ, to the count, or to the action. If the defendant pleaded to the writ, and concluded to the action, it would be repugnant and bad, because by the conclusion he admitted the writ: the same if he pleaded to the jurisdiction, and concluded to the writ (*a*). Yet, on the contrary, if the plea was to the action, and the conclusion to the writ, the plea would be taken for a good one in bar (*b*).

The commencement therefore and the conclusion of a plea might be in some or other of the following ways. If to the action, *Et prædictus B. per attornatum suum venit et defendit vim et injuriam quando, &c. Et dicit quòd ipse de debito prædicto, &c. onerari non debet, quia dicit, &c. Et hoc paratus est verificare, unde petit judicium si prædictus A. actionem suam prædictam versus eum habere debeat, &c.* If to the writ, *Et prædictus B. venit et defendit vim et injuriam, et petit judicium de brevi originali loquelæ prædictæ, quia dicit, &c. Et hoc paratus est verificare, unde petit judicium de brevi illo, et quòd breve cassetur, &c.* If to the declaration, the alteration was, *mutatis mutandis, judicium de narratione, and quòd narratio cassetur* (*c*). A very material part of the conclusion of a plea was the general averment, or *paratus est verificare*; and this was required in all pleas, replications, or other pleadings containing matter of affirmation. But a plea that was the general issue, or in the negative, ought not to be averred. The nature of replications, rejoinders, and the other pleadings, wherever they differed from a plea in the form, will be better seen in what will hereafter be said upon the different parts of pleading.

Of argumentative pleading. The great object of pleading being to bring the question between the parties to a certain point, it was expedient to hold the plaintiff and defendant

(*a*) 37 Hen. VI, 48.

(*b*) 37 Hen. VI, 24.

(*c*) Rast. passim.

to a strict way of stating his allegations, so that the adversary's plea might be answered directly and plainly, without leaving the sense to be collected by argument or inference. Thus it was held, that in trespass for depasturing the plaintiff's grass, it was not sufficient for the defendant to say, *non depascit herbas*, for this they would call an *argumentative plea*, which the law would not allow; but as it meant that the defendant was not guilty of the charge, he should be compelled to say so, in the formal and established plea of *non culpabilis* (a). Again, in trespass for entering a garden, and where the defendant pleaded that there was no such garden, this was held to be *argumentative*; and as it amounted to the general issue, the defendant was driven to plead *non culpabilis* (b). These might seem to be prejudices in favour of an established form of words, rather than instances where great precision was effected by rejecting such argumentative answers. The most common instance in which argumentative pleading seemed to mislead and confound, was where some special matter or circumstance was stated, and the other party, instead of a direct denial of it, set up some contrary circumstance, as apparently incompatible with it, and therefore in effect amounting to a denial; as where it was pleaded that a person was resident at *B.* and it was replied that he was resident at *F.* (c); or where it was pleaded that one of the defendants was dead before the writ purchased, to which it was replied that he was alive (d); or where a defendant was declared against as executor, and he pleaded that the party died intestate (e). All these were pronounced such pleadings as the law would not allow, though they had been very common in the reign of Edward III. (f) and were then the occasion of much difficulty. For, without considering the want of precision in such allegations, it was a great difficulty, when an issue

(a) 22 Hen. VI. 37.

(b) 10 Hen. VI. 16.

(c) 19 Hen. VI. 1.

(d) 19 Hen. VI. 4.

(e) 20 Hen. VI. 1.

(f) Vid. ant. 110.

depended upon two affirmatives, to decide from which place the venue should come, whether from the place alleged by the plaintiff, or that alleged by the defendant. This and other consequences from this old way of pleading, had induced the courts of late to lay it down as a rule, *that every affirmative in pleading should be answered by an express negative (a)*. Conformably with this rule, the above pleas ought to have gone on, and concluded with a denial of the adversary's affirmative allegation, which was usually done by an *absq; hoc*, or *sans ce*, or, as they more commonly called it, a *traverse*. The effect of
 A traverse. this was, that whatever new matter was started, the pleadings could not go on without an issue being soon raised, to be decided either by the court or a jury.

Thus where the declaration was for rent for the occupation of twenty acres of land, and the defendant pleaded a lease for twenty acres and twelve more, he was bound to traverse the lease for twenty acres (*b*). When the plaintiff claimed an annuity by prescription, and the defendant pleaded an annuity by grant, he was to traverse the annuity by prescription (*c*). Where a plaintiff claimed title to an advowson in gross, and the defendant set up a next presentation, he ought to traverse the advowson in gross (*d*). Notwithstanding it was now considered as a general rule that two affirmatives could not make an issue, there still remained some vestige of the old forms, which were now taken as exceptions to that rule. Thus if it was averred that the defendant was of full age, there needed no traverse that he was not within age (*e*). If no negative went before, an affirmative would be sufficient without a traverse: thus the plaintiff might say, that *I. S.* who appears, is *I. S.* of *D.* and the party sued is intended to be *I. S.* of *C.* without a traverse (*f*); and some other cases still existed, where the issue was held sufficient without a traverse.

(a) 18 Hen. VI. 8, 9, 10. (b) 32 Hen. VI. 3. b. (c) 32 Hen. VI. 4. 5.
 (d) 35 Hen. VI. 33, 34. (e) 19 Hen. VI. 54. (f) 33 Hen. VI. 10.

This was the general idea upon which a traverse was introduced; and when the matter pleaded consisted of one fact only, the application of it was obvious and easy; but where a plea alleged several facts and circumstances, it was a consideration of no small difficulty to decide which of them should be picked out by the traverse as the main point to be denied, and of course to rest the issue upon. Much argument arose upon a doubt of this sort, where a *formedon in discendre* was brought on a gift to the father and mother of the demandant in tail. The tenant pleaded that he, long before the donors had any thing in the land, was seised thereof in his demesne as of fee; and being so seised, and being within the age of twenty-one years, he infeoffed the donors, to have and to hold to them and their heirs; and the donors being so seised made a gift to the donees in tail, who had issue the demandant and died; and that the tenant being within age entered, by force of which entry he was seised in his remitter, and so he demanded judgment of the action. To this the demandant replied, that the donors made the gift to the donees, as had been stated in the declaration, *sans ce* that the tenant infeoffed the donors in the manner they had pleaded. It was objected to this replication, that the feoffment was only the conveyance to the bar, and that it was not the conveyance, but the matter and substance of the bar which should be traversed, confessed, or avoided; and there was great debate whether the *seisin* or the feoffment should in this case be traversed: but the court held the feoffment to be the substance of the bar, and therefore that it was properly traversed (a).

This was a question, whether a *seisin* or a *feoffment* was the proper point to be traversed: in the same year we find a case where the like doubt arose between a *disseisin* and a *feoffment*. In trespass *quare clausum fregit*, the defendant pleaded that one Richard Rawlins was seised of the

(a) Long. 5 Ed. IV. 9, 10, 11, 12.

same close in fee, and long before the trespass infeoffed the defendant in fee; and he gave colour to the plaintiff by the said Richard, and said the plaintiff entered, on whom the defendant re-entered, and committed the trespass. To this the plaintiff replied, that true it is that Richard was seised in his demesne as of fee; but being so seised, he infeoffed one Peter Bennet in fee; by force of which he was seised, and upon him the said Richard entered against his own feoffment, and *disseised* the said Peter; and the said Richard being so seised, made the feoffment to the defendant as he supposed, upon whom the said Peter entered and was seised in fee, and being so seised infeoffed the plaintiff. To all this the defendant made no other rejoinder, than that the said Richard did not disseise the said Peter. It was objected by the plaintiff, that this traverse was not properly taken, because the disseisin was not the force of the title, but the feoffment made to the person whose estate the plaintiff had before the feoffment to the defendant. This feoffment they said was the force of the title, and the disseisin only the conveyance to it. It was alleged in the argument on one side, that the common practice had been to traverse the feoffment: it was as strongly contended on the other side, that it had never been so adjudged; but that, on the contrary, it had been determined that the traverse of the disseisin was the proper pleading. To this effect indeed we find a rule laid down so far back as 9 Hen. VI. which says, that wherever a disseisin was alleged in a bar or replication, it should always be traversed (a). Afterwards, indeed, it was laid down by *Needham*, that the traverse might be *either* to the feoffment or the disseisin (b); and in the present case they held the traverse to the feoffment to be good (c), without any regard to, or indeed mention of the above rule; and left it for after-times to reconcile these differences, by holding, according to the

(a) Scien. de Plead. 355.

(b) Long. 5 Ed. IV. 136, 137.

(c) Ibid. 138.

opinion of *Needham*, that in such case either traverse was good.

When pleadings were long and special, they of course drove one of the parties to a traverse, and occasions were continually furnished to inquire what matters were traversable and what not, whether in pleas or in declarations. This made one of the nicest and most curious parts of the science of pleading. To enter minutely into it would carry us too far: from what has been already said, it appears that a traverse should be directed to that which is the substance and matter of the title; but such was the subtilty with which points of law were treated, that this general rule stood in need of many auxiliary ones to assist the mind in judging of the particulars that should or should not be traversed.

The same love of precision which induced the courts to discountenance *argumentative pleading*, led them to pass a like judgment, and with the same justice, on ^{A negative} what was called a *negative pregnant*. ^{pregnant.} An instance of this may be seen, where in an action on the case against an innkeeper, for goods lost by his default, the defendant pleaded that they were not taken by his default; which answer was construed to be a denial *pregnant* with an admission that they might be taken, though not by his default; and therefore the court, in that case, compelled the defendant to plead the special matter (a). Again, where an action was brought against a man for burning the plaintiff's house by negligently keeping his fire, the defendant pleaded that the house was not burnt by his default in keeping his fire: this was held a negative pregnant, for the same reason as the beforementioned plea (b). There seems therefore to be this sort of affinity between an argumentative plea and a negative pregnant; that as the latter is a negative pregnant with an affirmative, so is the former an affirmative pregnant with a negative; and the cure for

(a) 22 Hen. VI. 38, 39.

(b) 28 Hen. VI. 7.

both is, in most cases, to add, or at least to substitute, a direct denial of the substance and gist of the plea or declaration which is to be answered.

If the courts would not admit a plea that did not directly answer the adversary's allegation, neither would they allow one that contained a multiplicity of matter, to each of which a distinct answer ought to be made: such

Of double pleading. was called a *double plea*. Thus where bastardy was pleaded as to one acre, and jointenancy as to another, this plea was held double, because bastardy went to both (a). Again, where a defendant, in avoidance of a bond, pleaded imprisonment at one place, and detainer till he made an obligation at another, this was held double (b). In debt for four marks of rent, the defendant pleaded first that one only was due; and further he pleaded, as to part a tender, and as to the remainder an entry before the day: this was held double (c). The remedy in this and other cases, where the party thought he had more points than one to object, and he would not willingly preclude himself of one by stating only the other, was to set forth that one in a *protestation*.

There were cases where multiplicity of matter might be stated without the charge of duplicity. Thus where the plea concluded with a *non est factum*, all the special reasons for the deed being void might precede (d). Again, a plea with a traverse was not double, because the traverse was held to waive the plea (e); the conveyance to the traverse being no more considered than what was taken by protestation. In some cases, however, double pleading was allowed: thus in justification for false imprisonment, twenty causes might be alleged without the charge of being double (f). Again, in favour of life, it was allowed in an appeal to plead some special matter, and then to plead over to the felony (g).

(a) 32 Hen. VI. 33. (b) 37 Hen. VI. 15. (c) 3 Hen. VI. 16. 19.
 (d) 38 Hen. VI. 26, 27. (e) 9 Hen. VI. 26, (f) 7 Ed. IV. 20.
 (g) 22 Ed. IV. 39.

A protestation was likewise necessary where the party would otherwise be concluded by force of the plea; as if a lord pleaded *nil debet* to debt brought by his villain, this would operate as an enfranchisement, because it admitted him capable of having property: he might therefore protest that the plaintiff was his villain, and for plea say, that he owed him nothing. For these reasons a protestation in after-times was very significantly termed "the exclusion of a conclusion." The rule in making a protestation was, that it should not be repugnant to the matter stated by way of plea. Thus where a defendant in replevin protested that he did not take the cattle, and for plea said there was no such vill, and then avowed to have a return (*a*); this was held to be such a repugnancy between the protestation and the avowing for a return, that they could not stand together. If the plea was found for the party pleading the protestation, the protestation would serve; but if against him, it would not serve the purpose it was designed for. Thus where a defendant in replevin avowed for rent, alleging that the plaintiff held by homage, fealty, and rent; and the plaintiff said, that he held by the rent, and nothing of the rent was arrear, and pleaded on, protesting that he did not hold by homage; there, if the plaintiff barred the defendant of his avowry, he should be excluded from demanding homage afterwards. Again, where in forger of false deeds the defendant took the forging by protestation, and traversed the publication, and that was found against him, the protestation would not aid him (*b*).

It was not sufficient that every single plea was drawn with the precision and accuracy above required, unless the successive pleas alleged by the same party were pursuant to and fortified what went before. It was therefore required that the matter first alleged should not be *departed* from, but that whatever

(*a*) 20 Hen. VI. 28. (*b*) 9 Hen. VI. 26, and 59. 33 Hen. VI. 45.

was added in the subsequent plea, should be in support and aid of it, otherwise the plea was bad: if therefore a defendant in his bar should allege a title to the whole estate, and in his rejoinder he should make title only to a moiety, this was held a departure, and as such the rejoinder was bad (*a*). The construction of pleas in these cases was very strict, as may be seen in the following instance. A tenant pleaded a devise to him; the plaintiff replied that the devisor was an infant; to which the defendant rejoined, that infants might devise by custom: this rejoinder was held a departure from the bar, which alleged a devise generally (*b*).

Colour in pleading. We come now to consider the nature of *colourable pleading*, a device of which we found some instances in the reign of Edward III. (*c*) but which was now grown into a settled form of pleading, and was explained upon grounds and principles that appeared satisfactory to the minds of lawyers. This pleading was used in assises, in writs of entry in nature of an assise, and in trespass. The matter suggested in this way was always a fiction, and owed its origin to two circumstances: first, a jealousy in defendants of trusting certain special points of defence to the verdict of jurors: and secondly, a rule of law, that if such special points amounted in fact to nothing more than the general issue, they should not have the effect of taking the cause from the verdict of the jury to the judgment of the court, but the defendant must plead the general issue in the usual form; as, *nul tort*, *nul disseisin*, in assise; *ne disseisa pas*, in a writ of entry; and *not guilty*, in trespass.

Thus suppose *A.* had infeoffed *B.* of certain land, and an assise was brought by a stranger against *B.*; in such case the tenant would be led by the inclination of his own mind not to plead the general issue, because then the validity of the title and feoffment would be decided on by the

(*a*) 22 Hen. VI. 51.

(*b*) 37 Hen. VI. 5.

(*c*) Vid. ant. 24.

jury; but he would endeavour to state a sufficient bar to the assise, and bring the question to the opinion of the judges, by saying, that *A.* was seised, and infeoffed him, by force whereof he entered, and then he would pray judgment if the assise would lie. But here the law would pronounce that this plea was not good, for it amounted to the general issue, which he must be compelled to plead in terms, or the assise would be awarded. The tenant therefore, in order to attain the object of having the matter decided by the court, used to give the plaintiff *colour*, that is, *a colour of action*, by which it would appear dangerous for the tenant to trust the matter, he had pleaded, to the judgment of unlettered men. Thus, in the above case, when the tenant pleaded that *A.* infeoffed him, he would add further, *that the plaintiff claiming by colour of a deed of feoffment made by the said feoffor, before the feoffment made to the said tenant (by which deed no right passed) entered, upon whom the said tenant entered*; and then he would pray judgment if the assise should pass: and because, in this case, it might appear doubtful in the minds of unlettered men, whether any thing did or did not pass by the first feoffment, as suggested, the law allowed that special matter to constitute a plea in bar sufficient to call upon the judges to decide whether the prior feoffment had really such effect or not (*a*).

This idea of giving colour was further refined upon; for besides suggesting that the plaintiff claiming by colour of a deed of feoffment made by a stranger (where nothing really passed), entered upon the freehold; they used to add, *upon whom A. B. entered, upon whom the tenant entered*; whereas there was no more an entry by *A. B.* than there was a feoffment to the plaintiff. The reason for this manner of pleading was, to protect the defendant from the construction that might be raised to his disadvantage upon the first of these pleas; for if the tenant by that pleading con-

(*a*) Doct. and Stud. 295.

fessed an immediate entry upon the plaintiff, or an immediate ouster of the plaintiff, the consequence would be, that should the title be afterwards found for the plaintiff, the tenant would be convicted of the disseisin by his own confession: and because the tenant, though he had no right to the land, might yet be no disseisor, it was usual to adopt the style of pleading last mentioned for his protection (a).

This is the general idea upon which pleading *colourably* was first resorted to and allowed by the courts. When this manner of pleading had once established itself, several rules obtained for the government of it, which, in some measure, restrained the fancy of counsel in the choice of such fictitious circumstances as were to be suggested in this colourable way. The principal of these rules, and indeed that which seemed to be of the essence of colour, was, that it should consist of some matter of law, or other difficulty to the lay-gents. For example, if I bring an assise against you, and you plead that you leased the same land to *A.* for his life, and then granted the reversion to me, and afterwards *A.* died, and I claiming the land by virtue of this grant to which the tenant never attuned, entered: or, if a tenant pleaded that he leased to the plaintiff, and afterwards the plaintiff surrendered such lease: in the first of these cases, the lay-gents were not capable of deciding that the grant was defective without attornment; nor in the second, that a surrender might be made by parol. Again, if the tenant said that the father of the plaintiff leased to him for the life of another, and afterwards released to him, and the plaintiff, supposing that the father died seised of the reversion, ousted him after the death of the *cestui que vie*; this would be a good colourable plea, because the lay-gents could not determine how the release enured, whether by way of feoffment, enlargement, confirmation, or extinguishment of estate. Again, if the

(a) Dr. and Stud. 301.

tenant pleaded, that the father of the plaintiff infeoffed him, and he suffered the father to hold and occupy the land at will; or if he pleaded that the plaintiff claimed as bastard and eldest son; these were points of difficulty which should properly be decided by the court, and therefore were good colourable suggestions. But if the tenant said, that he was seised till the plaintiff disseised him, upon whom he entered, it was ill; because all men, however unlearned, know, that in such a case the tenant was no disseisor: the same if he said that the plaintiff claimed as younger son, because every one knows the younger son cannot inherit before the elder. Such therefore, as cases perfectly intelligible to the unlettered, were adjudged by law improper to be sent to the jury on the general issue (a).

Another rule respecting the matter pleaded *colourably* was, that it should give to the plaintiff a fair pretence on which to support his action. Thus, in trespass for goods, it was necessary to give a possession to the plaintiff, though without title, because that was a good ground for an action of trespass; as to say, that the defendant being in possession of the goods as executor, the plaintiff took them, and the defendant retook them (b). In trespass for taking goods, the defendant said, that before the plaintiff had the goods, he was possessed of them as of his own property, and bailed them to A. to be rebailed to him; and that A. gave them to the plaintiff, who supposing the property to be in A. took them, and the defendant retook them (c). A third rule in pleading colourably was, that it should always be given by the defendant to the plaintiff, and always in a plea in bar (d). Such were the principal rules by which these fictitious suggestions were measured; and provided these, and some others of less consequence, were adhered to, the defendant was at liberty to state whatever happened to strike his mind; colours being as various as the pos-

(a) 19 Hen. VI. 21.

(b) 7 Hen. VI. 35.

(c) 7 Hen. VI. 31.

(d) 19 Hen. VI. 32.

sible ways in which the subject in question might be transferred and possessed.

It seems not to have been quite clear, in what cases the defendant was required to give colour, and in what the special matter of itself constituted a good bar. To form a judgment of this, we must content ourselves with some few determinations, without attempting to discover the reasons upon which they were decided. It is said, that where such matter was pleaded as bound the *possession* only, the defendant should give colour; as in case of a dying seised, and a discent to the defendant(a). But where the *right* was bound, as by feoffment with warranty, by fine, and the like, there no colour need be given. Again, if a defendant pleaded *liberum tenementum*, he need not give colour, nor where he justified as servant to one who had the freehold(b): the same where one justified for a distress; because, says the book, where no property was claimed, there no colour need be given(c). It was held, at one time, that in justification for taking as wreck, or as the goods of felons, the defendant should give colour(d): but afterwards it was laid down, that in those cases, and also in justification for tythes, for waif and stray, or as a purchase in market overt, no colour need be given(e); though, in the case of goods sold in market overt, they made this distinction: If the defendant said simply, that *A.* sold them to him, he need not give colour; but if he had said, that *A.* was possessed of the goods *as of his proper goods*, and sold them to him, colour should be given; because, in this latter case, he fully stated, that no property was in the plaintiff, and therefore that he had no colour of an action; but in the former, there might be still a property in the plaintiff(f); which distinction seems analogous to that of the two cases before mentioned, where

(a) 22 Hen. VI. 18. (b) 21 Ed. IV. 15. 18 Ed. IV. 3. (c) 2 Ed. IV. 12. (d) 39 Hen. IV. 2. 9 Ed. IV. 22. (e) 21 Ed. IV. 18. 65. (f) 12 Ed. IV. 5. b.

the *right*, and where the *possession* only was bound. For the same reason, where a defendant pleaded wardship through a stranger, he was to give colour (*a*). If the plea was founded on an act of parliament, no colour need be given (*b*); because, says the book, an act of parliament bound all parties.

It would be unnecessary to enter further into a discussion on this obsolete piece of learning, which in a subsequent period was reduced to a more simple form, and at length went quite out of use. In the time of which we are now writing, this was a very prevailing fashion of pleading; and the reasons, that were advanced to give it authority, were thought to be well founded: a time came, when these were less considered, and the device of *colour* appeared to pleaders not so indispensably necessary. How this change in opinions operated, will be seen hereafter.

Instead of taking upon himself the defence of the action, the defendant, as we have seen, might call in the assistance of another person to protect him in his defence. One way in which a defendant might protect himself was by *voucher*, which was allowed only in real actions. This is as ancient as any thing in the practice of our courts, and has already been so fully explained (*c*), as to need no recapitulation. The present practice stood upon the law in Bracton's time, and the few alterations which had been made by statute in the reign of Edward I. and since; and to add any thing to the much that has already been said, might be thought an unnecessary repetition.

It is not so with *aid prier*, which bears Aid prayer. some affinity with vouching to warranty, and probably was first suggested by it. When an action was brought against a person, who, though in possession of the thing in question, had not the complete and entire property; and if judgment passed against him, another person

(*a*) 2 Ed. IV. 27.

(*b*) 3 Ed. IV. 2.

(*c*) Vid. ant. vol. I. 437.

who had right would be injured; the tenant or defendant might pray to have the aid of such person to defend the suit. Thus a tenant for life, by the courtesy, or the like, might pray aid of him in reversion or remainder, to plead for him and defend the inheritance. The entry of *aid prier* was thus: *Et prædictus tenens per attornatum suum venit, et dicit quòd, &c.* (then the cause of aid prayer was alleged) *Et sic prædictus tenens dicit quòd ipse tenet, et die impetrationis brevis originalis prædicti querentis tenuit tenementum prædictum pro termino vitæ suæ remanere cuidam præfato B. et hæredibus masculis de corpore suo exeuntibus, sine quo idem tenens non potest tenementum prædictum cum pertinentiis in placitum deducere, neq; præfato querenti inde respondere. Et PETIT AUXILIUM de ipso B. &c. Et ei conceditur, &c. Ideo præceptum est vicecomiti quòd summoneat per bonos summonitores prædictum B. quòd sit hic a die Paschæ, &c. ad jungendum cum præfato tenente simul, &c. in respondendo præfato querenti de præfato placito si, &c. idem dies datus est partibus prædictis, &c.* (a) Upon demand of aid, and the prayer being granted, a judicial writ was sued out by the tenant, called a summons *ad auxiliandum*; at the return of which, if the prayee did not appear or essoin, or if he after made default, judgment was entered, *quòd tenens ad narrationem prædicti querentis sine præfato B. respondeat.*

A tenant for life had his option, either to vouch the reversioner, or pray him in aid (b). If the remainder in fee was to the tenant for life and another, he should have aid of that other (c). A tenant might have aid of a remainderman in fee, without shewing a deed; for the feoffment might be without deed (d). If aid was prayed of a reversioner, who took the reversion as conusee of a fine, this amounted to an attornment of the prayor (e). Aid of the reversioner might be had in a writ of entry, in

(a) Rast. *Aid prier.*

(b) 9 Hen. VI. 3.

(c) 33 Hen. VI. 6.

(d) 22 Hen. VI. 1.

(e) 57 Hen. VI. 5.

nature of an assise, though not in an assise (*a*); because the tenant was supposed to be in by reason of his own tortious act.

We find instances of aid granted in personal actions, as in replevin, trespass, debt, and annuity; in a *scire facias*, in attaint, ravishment of ward, and ejectment of ward. If another person was interested in the thing claimed of the defendant, there was the same reason as in real actions that he should have the aid of such person to protect his present possession, or title. Thus, if a writ of annuity, or debt for arrears of an annuity, issuing out of a benefice, was brought against the parson, he might have aid of the patron and ordinary; the two persons who should have concurred in such a grant, if any was made, and who at least were interested that the benefice should not be charged with such a demand after the death of the present incumbent (*b*): if, therefore, such annuity was upon the parson's own deed, as this only bound him, he could not have their aid (*c*). Thus in a replevin, a tenant for life of seignory might pray aid of the reversioner (*d*); and a plaintiff in replevin, being a termor, might have aid of the reversioner (*e*); because in both these cases the reversioner would be charged with the event of the suit. Where a defendant in trespass justified by commandment of one who had the freehold, he might have aid of such freeholder (*f*). In general, in personal actions, it was a rule that no aid prayer should be had before issue joined; but this was liable to many exceptions, and it was a point of much controversy, when aid should be allowed before issue joined, and when not (*g*).

Aid of the king was a piece of learning depending upon considerations somewhat different from those which governed the prayer of aid in the case of common persons.

(*a*) 14 Hen. VI. 22. 4 Ed. IV. 14. 21 Ed. IV. 15. (*b*) 2 Hen. VI. 8.
(*c*) 2 Hen. VI. 12. (*d*) 9 Hen. VI. 26. (*e*) 6 Ed. IV. 2.
(*f*) 7 Hen. VI. 71. (*g*) 7 Ed. IV. 2. 7 Ed. IV. 24.

In the first place, as the king could not be vouched, a tenant was driven to pray aid of the king in all instances where, from the nature of his estate, he would be intitled to vouch a common person, or to have warranty of charters (a); and in such case, if he lost, he would, as in case of voucher, be intitled to recovery in value by petition (b).

Aid of the king was therefore of two kinds: it was either upon a warranty, and was for the purpose of recovery in value, and then it corresponded with voucher; or it was founded on the feebleness of the tenant's estate, and then it corresponded with the *aid prier*, of which we have just been speaking. On this, as well as other accounts, there were several material differences between the practice of praying aid of a common person, and of the king. Thus in the former case, if it was in an action of trespass, it could not be till after issue joined; in the latter, it must be before (c); because the king should not be put to support an issue that was joined by a common person (d).

By aid and voucher, a third person was introduced into the action, through the solicitude of the tenant to defend the subject in dispute. If the tenant took another part, and appeared to defend faintly or collusively, or made default, the person in reversion or remainder, or any one otherwise interested, by authority of certain statutes passed in the reign of Edward I. and extended in subsequent reigns (e), might *pray to be received*, and defend his freehold or inheritance. The entry in such case was as follows: *Super quo venit quidam A. hic in curiā in propriā personā, et dicit quòd diu ante diem impetrationis brevis originalis, &c.* Then the record set forth the seisin in fee of A. who leased to the tenant for life, the reversion in fee continuing in A. and then it went on, *Et dicit quòd pro eo quòd prædictus tenens, &c. in brevi prædicto non petive-*

(a) 9 Hen. VI. 56.

(b) 9 Hen. VI. 3.

(c) 35 Hen. VI. 56.

(d) 7 Ed. IV. 8.

(e) Vid. ant. vol. II. 151.

runt auxilium de ipso A. neq; ipsum vocaverunt ad warrantizandum, &c. sed per fraudem et collusionem inter ipsos querentem et tenentem, intentione ad faciendum ipsum A. amittere inde jus suum fictè placitaverunt, et hoc paratus est verificare; unde ex quo idem A. venit ante judicium redditum paratus præfato querenti respondere, et jus suum defendere, petit quòd ADMITTATUR ad defensionem juris sui (a).

The time of praying to be received was, when judgment was about to be given for the demandant, without further process. Upon the receipt of the reversioner, the demandant might count against him *de novo*; for by the receipt the former count was waved, and no advantage could be taken of any defect therein (b). The person received might plead almost all pleas, and take all advantages which the tenant might, such as voucher, aid, age, and the like (c); but he could not imparle: and if he made default it was peremptory, and judgment was entered against the tenant, without taking any notice of the tenant by receipt; because the tenant by receipt having alleged that he was *paratus petenti respondere*, he ought always to be present in court (d). Receipt was only allowed in real actions; but it had been extended beyond the actions mentioned in the statutes of Edward I. as to waste, *quem redditum reddit*, and many others.

To all the foregoing prayers the demandant or plaintiff might, by way of counterplea, allege such matter as would take away the prayer of the tenant or defendant; and the vouchee besides might counterplead the warranty, and shew that he was not bound to warrant the land.

The common counterplea to aid and receipt was, that the prayee had nothing in the reversion the day of the writ purchased. It used to be common for a tenant, after the writ was brought, to convey the estate in fee, and take

(a) Rast. 530.

(b) 33 Hen. VI. 53.

(c) 21 Hen. VI. 28.

(d) 21 Hen. VI. 48.

back an estate for life, so as to baffle the demandant: when a tenant who had so acted, pleaded that he was only tenant for life, this used to be replied, and would oust him of his aid; and if replied to the prayer of receipt, it would oust such collusive reversioner of his receipt (a). The common counterpleas to voucher of warranty were such as are given by the statutes of Edward I. (b)

Another way in which a defendant might relieve himself from the burthen of contesting singly with the plaintiff, was by *garnishment* and *interpleader*. The former of these was allowed only in the action of detinue; the latter, though more frequently used in detinue, might likewise be resorted to in some other actions.

Of garnish-
ment. The practice of depositing deeds in the hands of a third person to await the performance of covenants, or the doing of some act, upon which they were to be re-delivered to one or other of the parties, still continued (c), and gave occasion to many actions of detinue, which were brought against the depositary of such writings, whenever the crisis happened for their being demandable, according to the terms of the agreement on which they were deposited. It was in these actions that the defendant would find himself driven to call in the other party to the agreement and deposit, that the re-delivery might be made to the persons who had a legal right to call for it from the defendant. Thus in an action of detinue for such deeds delivered by the plaintiff to the defendant to be re-delivered, the defendant would plead that they were delivered by the plaintiff *and one J. N.* upon certain conditions, and he did not know whether the conditions were performed, therefore he prayed *garnishment* (as it was called) against *J. N.*; that is, that *J. N.* might be summoned to shew whether they were: upon this a *scire facias* would issue against *J. N.* who under the name of

(a) 21 Hen. VI. 13. 4 Ed. IV. 14.

(b) Vid. ant. vol. II. 120. 226.

(c) Vid. ant. vol. II. 335, 336.

garnishee became defendant to the suit, the first defendant being considered as out of court by the garnishment.

The entry upon the record stood thus: *Et prædictus defendens in propria personâ venit, &c. Et proferendo hęc in curiâ cartam, &c. paratus ad deliberandum cui vel quibus curia domini regis concederet, dicit quòd carta illa die anno et loco supradictis, eidem defendenti tam per prædictum querentem quàm quendam I. N. unanimi eorum assensu et consensu, æquâ manu liberata fuit sub certis conditionibus custodiendis, et eidem querenti et I. N. aut eorum alteri sub conditionibus illis reliberandam, sed utrùm conditionis illæ ex parte prædicte I. N. ad impletæ sunt necne, dicit quòd ipse omnino ignorat. Et petit quòd prædictus I. N. inde PRÆMUNIATUR et ei conceditur, &c. Ideo præceptum est vicecomiti, quòd per probos, &c. scire faciat præfato I. N. quòd sit hic in octabis, &c. ostensurus, &c. quare carta prædicta præfato querenti liberari non debeat si, &c. Idem dies datus est partibus prædictis hic, &c. (a).*

When the garnishee appeared, he was to plead; and many questions arose upon what the garnishee might plead, and what not. It was very early settled, that he should not plead a misnomer of himself in the *scire facias* (b); nor should he plead in abatement of the writ of detinue, because it was in effect his own writ, he being a party to the bailment (c); and yet he was allowed to plead excommunication of the plaintiff (d), or release of all actions (e). He was not to have oyer of the declaration, unless he appeared at the first day; and he was not to be declared against afresh, nor could plead to the writ or declaration, if admitted by the defendant (f). He might not plead foreign matter, but only in cases apparent, as *amicus curiæ* (g). If the defendant had stated what the conditions

(a) Rast. 212. (b) 3 Hen. VI. 37. (c) 3 Hen. VI. 40. (d) Ibid.

(e) 20 Hen. VI. 23. (f) 3 Hen. VI. 50. (g) 9 Hen. VI. 38, 39.

were on which the deed was to be delivered, or he admitted those alleged by the plaintiff, the garnishee could not vary from them, and allege different conditions; but if the defendant alleged *certain conditions* generally, then the garnishee might shew them specially (*a*). The remedy for the garnishee, if he conceived the conditions to be different, was to bring a new action against the defendant; and then the conditions might be contested between the two plaintiffs by interpleading, as will be shewn presently (*b*).

If the plaintiff succeeded in his action, the judgment against the defendant was to recover the deed, which had remained in the custody of the court to abide the decision of the suit, and against the garnishee for damages in the delay occasioned by his plea: if he failed, the garnishee would have damages against him (*c*). The execution of the garnishee was only of his goods, chattels, and land, and not of the body, because he was not a party to the original writ (*d*). If the plaintiff replied to the defendant's prayer, that the deed was delivered by himself alone, and traversed the delivery by him and the stranger, this would prevent the garnishment (*e*). The plaintiff might reply to the plea of the garnishee, but not the defendant, as he was out of court (*f*). Garnishment might be had against executors, as well as the principal who made the bailment. It could not be had against a mere stranger, but must always be preceded by an allegation of privity to the bailment (*g*).

Of interpleader. If the two parties who concurred in the bailment to the defendant, brought several actions for the deed, then the resource of the defendant was in praying that the two plaintiffs might *interplead*. This was upon allegations similar to those made in the case of garnishment; and the entry was thus: *Et prædictus de-*

(*a*) 21 Hen. VI. 35. (*b*) 20 Ed. IV. 13. (*c*) 1 Ed. V. 3. 27 Hen. VI. 2.
 (*d*) 7 Hen. VI. 45. (*e*) 3 Hen. VI. 50. (*f*) 14 Hen. VI. 11. (*g*) 3 Hen.
 VI. 44.

fendens per attornatum suum venit, et tam ad sectam prædicti A. quàm ad sectam prædicti B. defendit vim et injuriam quando, &c. Et proferendo hîc in curiâ prædictum scriptum obligatorium paratus ad deliberandum cui prædictorum A. et B. curia hîc concederet, dicit quodd scriptum illud est idem scriptum quod uterq; prædictorum A. et B. versus eum exigit, et quodd, &c. as in the former precedent. Et petit, quodd prædictus A. et B. super liberatione scriptorum prædictorum inter eos INTERPLACITENT, &c. Ideo consideratum est, quodd prædictus A. et B. super liberatione scriptorum prædictorum habendâ interplacitent, &c. Et dictum est per curiam præfato B. quodd præfato A. ad breve et narrationem suam, de eo quod idem A. inde priùs narravit, respondeat, &c (a). It was held, upon such interpleader, that the person whose writ was of the prior date should be the plaintiff, and the other plaintiff should answer his writ and declaration, and so become defendant (b). If they were of the same date, then he who first came and demanded an answer, or he whom the court pleased to assign, became plaintiff (c).

It was reasonable, where the defendant was a mere depository of a deed, in which the two persons who agreed in making him the trustee were interested, that he should not be harassed by both, but be allowed to call on the court to award, that they should contest the points in dispute between themselves. But there were cases where a person possessed of a deed might be liable to the actions of two or more persons for the detinue; and where it was argued with some shew of reason, at least as far as topics of a legal and technical nature might be urged, that the defendant should not have this privilege, but ought to remain in the situation of defendant to both their actions, and defend himself as well as he could against both the claims to which he was liable, whether by choice or otherwise. Thus a writ of detinue was brought by A. and the

(a) Rast. 208.

(b) 3 Hen. VI. 20.

(c) 19 Hen. VI. 3.

plaintiff declared on a bailment made by *I. G.* to the defendant to rebail to the plaintiff; and *I. G.* also brought another writ, and declared of a bailment made by himself to the defendant to rebail to the said *I. G.* and this was pleaded to the former writ. It was argued, that the defendant could not have garnishment against *I. G.* (if *I. G.* had not brought his action) because he had alleged no privity, and therefore that *A.* should not call upon the two plaintiffs to interplead. But it was said, that there needed no privity of bailment, the possession merely, and not the bailment, being the cause of action; for if the defendant had found the deed, and had pleaded that to the action, then it was long settled that they should interplead: so in this case, the defendant was properly liable to none but the person who had right, and yet he had no legal defence, and therefore must refer it to an interpleader; for should they both recover, and a writ issue for the delivery of the deed, to whom should it be delivered? On account of all these inconveniences, it was held that the two plaintiffs should interplead (*a*).

Some of these considerations arose on the occasion of two actions of detinue for a box of charters; one by the heir who was intitled to the land, and one by the bailor upon a bailment to re-deliver to him. It was there urged, that the defendant should not have an interpleader, because he was liable to both the plaintiffs; to the tenant of the land, because he had a right to the charters; and to the bailor, by reason of the bailment; and if he was a sufferer by this double charge, it was his own act, and he must not complain. And it was laid down for law, if a man bails a thing to me to be rebailed, and I afterwards deliver this to another, and he bails it to me to be rebailed, I am chargeable at the suit of both: and in the case at bar it was contended, should the plaintiff who had the land recover the charters, this would be no plea for the defendant to discharge him as against the bailor, although it

(*a*) 3 Hen. VI. 43.

would be otherwise in the case of executors, or where the things came to the defendant by a *finding*; for there it would be sufficient if he restored it to the right owner.

This was arguing upon the special manner in which they used to declare in detinue, and seems wholly conformable with the old ideas upon which this action and the pleading in it used to turn; this being the ground upon which the bailment was held to be traversable. But in opposition to this it was answered, as on the former occasion, that the bailment was nothing to the purpose; that the detinue was the point and git of the action; and that the bailment was only the conveyance to it: that in this case, if the bailor should recover, the person who had the land might have detinue against him, as he alone was intitled to the deeds; which circuitry would be avoided by an interpleader: to avoid therefore multiplicity of suits, as well as for the other reasons, they were inclined to award an interpleader (a).

It is not improbable that such opinions as these led to an alteration in the manner of declaring upon a writ of detinue; for if it was settled that a man should not be bound by a special bailment, but that the person who had right should recover, that sort of declaration became futile and unnecessary; and the purpose was equally answered by a general allegation of a *devenerunt ad manus*, or a *trover*. These opinions, however, had not yet grown to be established law. For in 19 Hen. VI. we find two several writs of detinue were brought against the same person, and they counted of several bailments. There it was held, that the parties should not interplead, unless the defendant could allege a privity of bailment, or that he found the deeds; for if he chose to charge himself with several bailments, it was his folly, says the court, and he must abide by it: the defendant then pleaded that the two plaintiffs joined

(a) 9 Hen. VI. 17.

in the bailments, and he traversed the several bailments; upon which the court suffered the defendant to have an interpleader (*a*), because he now alleged a privity between them. Thus the court would, if possible, get rid of the conclusion that arose upon the special bailment, and enable the defendant to get justice done between the two plaintiffs.

If a defendant had prayed garnishment, and afterwards the garnishee counted against them, it was once held he might have an interpleader between the two plaintiffs (*b*); though, on a later occasion, it was refused on the notion of the defendant being out of court by the garnishment (*c*).

If the two writs were brought in different counties, it was held at one time, that the plaintiffs might still interplead (*d*): it seems afterwards to have been held that they should not (*e*): the same if the bailments were alleged in different counties (*f*). But afterwards (as the above notion began to prevail) it was agreed that the plaintiffs should notwithstanding interplead, upon the idea that the detinue, and not the bailment, was the point of the action (*g*).

The interpleading which has hitherto been mentioned is confined to the action of detinue, being that with which this style of pleading was most connected: this expedient, however, was allowed in some few other actions. We find, where two writs of *quare impedit* were brought for the same avoidance, the second plaintiff was awarded to interplead to the elder of the two writs (*h*); it was likewise allowed where two writs of ward were brought for the same wardship; but not in ravishment of ward (*i*). If a person was found by office to be heir of a tenant to the king in one county, and another was found such in another

(*a*) 19 Hen. VI. 3. (*b*) 8 Hen. VI. 30. (*c*) 11 Ed. IV. 11. (*d*) 38 Hen. VI. 2. (*e*) 8 Hen. VI. 30. (*f*) 14 Hen. VI. 2. (*g*) 5 Ed. IV. 25. (*h*) 19 Hen. VI. 68. (*i*) 9 Hen. VI. 17.

county, it was the practice for them to interplead before either had livery (a). There is an instance of three writs of detinue, where, after much argument, the three plaintiffs were awarded to interplead (b).

Among the pleas that might be pleaded in different actions, there are some few which recurred so frequently, and were so often the subject of discussion in court, that they cannot be passed over without some observation in this place. These were the pleas of *hors de son fee*, of disclaimer, of nontenure, of jointenancy, and the common replication of *de son tort demesne*.

When a person claimed a seignory, and dis-
trained and avowed for the rent, or brought an
action for the disseisin, the tenant might plead *hors de son fee*, that is, that he held nothing of the person who claimed the seignory. By the form of this plea it is apparent, it would not hold in such actions as stated a title with certainty: it was, *actionem suam prædictam versus eum habere non debet, quia dicit quòd messuagium prædictum cum pertinentiis est extra fædum et dominium ipsius A. unde petit judicium si prædictus A. absq; speciali titulo hîc ostendendo, actionem suam prædictam de redditu prædicto habere debeat, &c* (c). Such a plea was construed as an admission of the tenancy. In a writ of entry on a disseisin of rent, brought by an abbot on a disseisin made to his predecessor, the writ merely alleged generally, *quam clamat esse jus ecclesiæ suæ, &c.* of which the tenant disseised his predecessor; and he declared accordingly of the seisin of such a person his predecessor in right of his church. To this was pleaded *hors de son fee*; but it was urged this was not a proper plea, because the seisin and disseisin of the predecessor being laid in the count, this was sufficient title. In answer to this, it was held by the whole court, and resolved, that the plea was good; for the allegation of the

(a) 9 Hen. VI. 17.

(b) 5 Ed. IV. 9.

(c) Rast. 128.

predecessor's disseisin could not be said to be a title to any body, nor could any allegation of seisin, without the title by which that seisin was gained. Further, they said that in formedon, *hors de son fee* was no plea, because sufficient title was comprized in the writ; namely, that such a gift of the rent was made in tail, or for life. So here, if a formedon had been brought in the reverter of the rent, stating a gift in tail to one, and on default of issue a reverter to the demandant; or a writ of intrusion, or other writ of a demise to another for term of life, who died, and the defendant intruded, and that it ought to revert to the demandant; in these cases, *hors de son fee* would not be a good plea, because sufficient title was comprized in the writ to acquaint the terre-tenant what rent was demanded.

But of all these the terre-tenant, in the present case, was ignorant, as the demandant might have several other rents in the same vill. Again, the demandant here claimed in right of his church, and was in by succession, and not by his predecessor; so that it was in the nature of a writ of entry for rent and a disseisin done to the demandant himself, in which it was agreed that *hors de son fee* was a good plea, the same as in assise. But where an heir, who claimed by an ancestor, and who was in by him, brought a writ of entry *sur disseisin* done to his ancestor, or of mortauncestor, or of cosinage of rent, there seemed more colour that *hors de son fee* should not be a plea; because the writ contained, in some manner, a title, by giving the tenant notice of the rent demanded. And yet it seemed hard that the seisin or disseisin of an ancestor should be construed such a title in the heir as to oust the tenant of this plea, when he really saw no such certainty in the demand as there was in a formedon: and therefore, some of the court held, that it would be a good plea both in mortauncestor and cosinage, or a writ of entry *sur disseisin* done to the ancestor; because dying seised of a rent did not give so strong a title to an heir or successor, as the dying seised of land; for a

dying seised would take away the entry of the disseisee, which was giving a sort of title to the heir; but not so of a rent, which might be reseised, or reclaimed, or distrained for (all which were in lieu of an entry), notwithstanding the discent; much more therefore in the case of an abbot, who was not in as heir but by succession (a).

It was said, that the tenant in replevin should not plead *hors de son fee*, because he might, if he pleased, disclaim; and besides, the issue of *hors de son fee* would be peremptory for the lord and not for the tenant, which was unreasonable (b). It was likewise held, that *hors de son fee* was a good plea in rescous (c); but it was afterwards laid down not to be good either in rescous or trespass, but the defendant should shew of whom the tenure was, and then he might conclude *issint hors de son fee* (d); which was making it a plea of *special nontenure*, one of a very different sort from the original form of it, and that upon which all the above discussion arose. The plea of *special nontenure* was allowed in some cases where the general plea of *nontenure* was not, as in *scire facias* (e).

A person on whom a claim was made in a judicial proceeding, whether to recover a seignory or a tenancy, might *disclaim*. Thus the plaintiff in replevin might plead to the avowry, *non tenent de eodem, &c. sed easdem acras terræ de eodem tenere omnino deadvocat, et disclamat, &c* (f). And in the like way might the tenant in a *præcipe quòd reddat*, or any other writ which demanded the land, or a rent issuing out of the land, disclaim. The effect of this disclaimer in all writs for recovery of land was, that the demandant might enter upon it and take possession; but in a replevin, the avowant instead of entering was obliged to bring his writ of right *sur disclaimer*; the replevin not being an action for the recovery of the land itself. In this writ of right, the demandant in

(a) Long. 5 Ed. IV. 91. (b) 5 Ed. IV. 2. (c) Long. 5 Ed. IV. 88.

(d) 6 Ed. IV. 4. (e) 7 Hen. VI. 25. (f) Rast. Disclaimer.

his count stated the whole proceedings in the replevin, with the disclaimer, and then went on, *per quas quidem disclamationem et disadvocationem accrevit jus &c. ad petendum, &c. in dominico suo ut de fædo, &c. Et quòd tale sit jus suum petit recognitionem fieri per magnam assisam, &c (a)*. Thus the replevin and disclaimer therein became the ground of the writ of right, which corresponds with the manner of proceeding stated in the time of Henry III. from Bracton (b).

Upon this subject of disclaimer there was much nicety and refinement, which made it a considerable title in the science of pleading, especially when accompanied, as it sometimes was, with the plea of nontenure and jointenancy, which will be considered presently. If the demandant might enter upon the tenant disclaiming, it was nothing more than consistent that the disclaimer should completely estop him, if he brought his assise for such an entry. If the writ was brought against two tenants, and one disclaimed, the whole tenancy rested in the other; so as upon his making default, the demandant had judgment to recover the whole (c): the same if one of the tenants pleaded nontenure (d). If a lord paramount distrained upon the tenant paravaile, and in replevin avowed upon him, he could not disclaim, because he did, in truth, hold of him, though *per medium*; but he should state the special matter (e). None could disclaim but those who were seised in demesne (f); and therefore it was a good replication to a disclaimer in replevin, that he was not tenant of the freehold at the time of the disclaimer (g), for he who had nothing could forfeit nothing. If the defendant in replevin justified instead of avowing, it was held, the plaintiff could not disclaim (h); and the reason of this difference seems to be, that, upon a justification, the defendant was not in-

(a) Rast. 220.

(b) Vid. ant. vol. II. 47.

(c) 33 Hen. VI. 53.

(d) 36 Hen. VI. 23.

(e) 9 Hen. VI. 27.

(f) 21 Ed. IV. 47.

(g) 12 Ed. IV. 13.

(h) 15 Ed. IV. 29.

titled to any return. As to a disclaimer in one action being pleaded to another action, there seemed to be a difference between actions where damages were recoverable and where they were not. Thus in replevin, where the plaintiff pleaded that he had before disclaimed, it was over-ruled, and he was obliged to plead his disclaimer again (a). As a tenant might disclaim, so likewise might a lord. Thus where a tenant by homage ancestral vouched his lord, and the lord had not received the homage, he might disclaim the seignory, and so oust the tenant of his warranty (b).

The plea of disclaimer was an abatement of the writ, so was that of *nontenure* and *jointenancy*.^{Of nontenure.} By the plea of *nontenure* the tenant said, *quòd ipse tenementa prædicta, &c. præfato W. J. reddere non potest, quia dicit quòd ipse NON EST TENENS eorundem tenementorum, ut de libero tenemento, nec fuit die impretationis brevis originalis prædicti, &c.* This was no plea in replevin as the former was, nor in *nuper obiit*, and some other writs; but it was good in all the writs for recovery of land, as well as in attain; and in a *scire facias*. This plea had a very different effect from a disclaimer, as to the question of property contended for by the demandant; for so far from being intitled to enter, as upon a disclaimer, the demandant by this plea was often entirely disappointed of his remedy; for if he could not find a person who was in such seisin of the land as to be a legal tenant to his writ, all judicial redress was at an end. This effect of the plea of *nontenure* was probably the parent of feoffments in trust, and gave rise to those fraudulent practices which were meant to be checked by the statutes of perjury of profits. Since those acts, it had been usual for the demandant to reply to the plea of *nontenure* in maintenance of the writ, and state such matter as came within the provisions

(a) 27 Hen. VI. 2.

(b) 28 Hen. VI. 10.

of those acts, which if proved would make the tenant liable.

The reply to nontenure, under these statutes, was usually this, or the like: That he himself was seised till he was disseised by the said tenant, who made a feoffment to persons unknown, in order to defraud the demandant of his land: with an averment, that the tenant ever since the disseisin had taken the profits. In order that the tenant might not fly from the main point in the action, he was held down to traverse the pertainancy of the profits and not the feoffment (a).

Of jointenancy. The plea of jointenancy, namely, that the tenant was seised of the land as jointenant with A. and not solely, was applied to the same purpose of protecting a feoffment that had been fraudulently made; and it had been held, that this plea was within the equity of the statutes, and therefore that the demandant might reply in maintenance of the writ, as in the former case (b). Upon argument it was determined, that to a plea of disclaimer there could not be a similar reply, because it was neither within the words or equity of the statutes (c): nor indeed, as we have before seen, was there any need of these statutes to assist the demandant in such a case; for he might immediately enter on the land.

If the plea of jointenancy went only to part of the land in question, the demandant might get rid of that obstacle, by *abridging*, as it was called, his demand as to that, and going on for the remainder. *Abridgment* was an expedient that was allowed only in actions that were particularly circumstanced. Thus, in assise, where the writ was *de libero tenemento*; in dower, where the writ was for the *rationabilis dos*; in ward, where it was *pro custodia terræ et hæredis*; and in cases similar to these, the demandant might abridge his plaint or demand, because the writ

(a) 1 Ed. IV. 2.

(b) 9 Hen. VI. 14.

(c) Long. 5 Ed. IV. 44.

would still continue to justify the proceeding. But in *præcipe quòd reddat*, where a certain number of acres are demanded, no abridgment was allowed, because the demandant by so doing would falsify his own writ; and where a writ was admitted to be false in part, it abated for the whole. And so in assise *de libero tenemento* in *A.* and *B.* the plaintiff could not abridge in *B.* because his writ would then be false (*a*). So if it was pleaded that certain acres extended into the manor of *A.* the demandant could not abridge those acres (*b*). An abridgment of the plaint might be made so late as after the jury had been sworn, and were gone out to consider of their verdict (*c*). Thus the demandant, if he thought his proofs not sufficient to maintain his plaint, was at liberty to abridge such part as appeared doubtful, at any stage of the proceedings, when it seemed most expedient or necessary.

The common replication to a justification in trespass was, *de son tort demesne*, or, as it was generally called, *de injuriâ suâ propriâ*. This was either general or special; it was a denial that the defendant had such cause as he alleged for doing the trespass, and it maintained that he did it of his own wrong. The general replication was, *quoad prædictum placitum prædicti B. &c. in barram placitatum, dicit quòd ipse, &c. precludi non debet, quia dicit quòd, &c. vi et armis, &c. de injuriâ suâ propriâ et absq; causâ, &c. in eodem placito superiùs allegatâ, &c. in ipsum A. insultum fecit, &c.* If it was special, it went on with a traverse of some of the matter alleged in the bar; as, *absq; hoc, quòd prædicta acra terræ cum pertinentiis, &c. prout prædictus B. superiùs allegavit.* The former concluded to the country, the latter with a *paratus est verificare*; which indeed was the true reason why it was necessary that it should be ascertained when the one or the other was the proper replication.

(*a*) 14 Hen. VI. 4.(*b*) 32 Hen. VI. 4.(*c*) 33 Hen. VI. 18.

Notwithstanding some differences of opinion respecting this point, we find rules laid down for the government of pleaders. Thus, where the justification rested wholly upon a matter of fact, there the replication might be general; but where it consisted of a matter of record or title, or authority of law, in such cases it was required to be special. If a sheriff justified under a writ, the replication must be special; but if a person justified under a sheriff's warrant, this was only matter *in pais*, and the general replication would do (a). If a defendant pleaded freehold in himself, the replication must be special; but if in another, and he justified by the command of such freeholder, the replication might be general, because in the latter case nothing was in issue but the command, and not the freehold (b).

If the justification was for imprisonment under the warrant of a justice of peace (c), for apprehending the plaintiff in the attempt to commit a robbery (d), or to burn a house (e), or for apprehending one suspected of felony; to all these it was sufficient to reply, *de injuriâ suâ propriâ absq; tali causâ*. But if it was under an authority from the plaintiff himself, as by a licence, a gift, a lease, or the like; or, in many cases, under the sanction of law, as to view waste, going into a tavern for victuals, and the like (f); if a prescription was alleged (g); if he justified for rent under a lease to the plaintiff (h); in such cases the general replication would not be sufficient, but he should traverse the special matter of the bar, *absq; hoc* that he leased, and the like; and sometimes he should make a title.

Where two or more persons were equally invested with a right, as executors, parceners, and the like, and any of them declined engaging in a suit that was thought necessary to be brought, the course the others were to take was by

(a) 19 Hen. VI. 7.

(b) 8 Hen. VI. 34.

(c) 9 Ed. IV. 31.

(d) 9 Ed. IV. 27.

(e) 22 Ed. IV. 45.

(f) 12 Ed. IV. 10.

(g) 28 Hen. VI. 9.

(h) 10 Hen. VI. 3.

summons and severance. This might be done in any stage of the proceedings, whether at the return of the writ, after issue joined, at *nisi prius*, or at the day in bank, as the case might happen. As soon as either of the plain- Summons and severance.
tiffs made default, the other prayed a sum-
mons to be issued against him, requiring him to carry on the suit with the other plaintiff. This writ was called a *summons ad sequendum simul*; and if he did not appear, there was an award, that the other plaintiff might go on without him; the entry of all which upon the record was thus: *Et modò venit* (one of the plaintiffs) *per attornatum suum, et prædictus* (the other plaintiff) *quarto die placiti solenniter exactus non prosecutus est breve suum prædictum; ideo summonitus est quòd sit hìc in octabis, &c. ad sequendum versus, &c. simul cum prædicto, &c. &c. ad quem diem, &c. non venit, &c. Ideo concessum est quòd prædictus* (the one plaintiff) *sequatur solus sine ipso* (the other plaintiff) (a). Summons and severance lay in writs of ward, detinue of charters, and other personal actions of the same kind; in debt, or account by executors; in attaint also, if it lay in the primary action; and it lay in formedon, and other real writs; but not in trespass, conspiracy, and other personal actions founded upon torts: for in these, if an action was brought in the name of two, and one of them declined going on, they were both nonsuited (b).

There still remain many forms of pleading, Forms of pleading.
of which we have not yet treated: these consist in the formal language and manner in which the substantial and effective part of a plea was stated. It was impossible that a set form of expression could be designed for every matter that might become the subject of a declaration, or plea. But many modes and circumstances of property recurred so often in judicial enquiries, as to obtain apt and stated forms of description and allegation, which were established by long usage; the experience

(a) Rast. 311.

(b) 34 Hen. VI. 53.

of them having shewn them preferable to all others. These, therefore, were adhered to by pleaders; and the nicety with which they were conceived, is a strong mark of the refinement and curiosity with which this part of our law was cultivated. To give some idea of this, we shall select such specimens as seem most likely to leave an impression on the reader.

When a defendant justified a taking, as for tythes, he being parson at the time of the trespass, this was held to be ill pleaded; because he should say, that he was parson at the time of severance, as well as at the time of the taking. So where a sheriff justified an arrest under a *capias*, he ought to say he was sheriff as well at the time of the arrest, as at the time of receiving the writ (*a*). In alleging a disseisin, it was not sufficient to say that he was seised till such a one *entered*, and made the feoffment in question; but he should say he was seised till disseised by such a one, or till such a one intruded, for the word entry might be understood of a lawful entry (*b*). A person who claimed by tenant for life, tenant in tail, or the parson of a church, or others, who were particular tenants, should aver the life of the particular tenant in his pleading (*c*). But in trespass where nothing was to be recovered but damages, there the plaintiff in his replication need not aver the life of such particular tenant, especially where he alleged seisin or possession, for this proved the estate to have continuance (*d*).

In a justification under a warrant from the sheriff, the defendant ought to state he had returned it to the sheriff; if not, he must shew the warrant itself (*e*). If an estate was made to two, and the heirs of one, the pleading should be that they were seised, *scilicet*, one *in dominico suo, ut defædo*, the other *in dominico suo, ut de libero tenemento*, expressing the distinct estates (*f*). A tenant at will must, in pleading,

(*a*) 35 Hen. VI. 48.

(*b*) 22 Hen. VI. 43.

(*c*) 19 Hen. VI. 73.

(*d*) 10 Ed. IV. 18.

(*e*) 21 Ed. IV. 66.

(*f*) 37 Hen. VI. 24.

shew how he was tenant, whether by demise, as a copyholder, by sufferance, or otherwise (*a*). In declaring on a judgment it was held, at one time, that the party pleading must commence from the original writ, and go through the whole record (*b*). So in pleading an outlawry, it was held not sufficient to say process was continued till outlawry, but every *capias* must be mentioned, and the whole record in certain (*c*). Yet afterwards it seems to have been agreed, that in a plea of outlawry it was enough, if in the same court, to begin at the exigent; and in all cases of debt on a judgment, the declaration might commence at the judgment, or the original, at the option of the plaintiff (*d*). A particular statute must be specially set forth in pleading, the same as a particular custom, otherwise the party could not avail himself of it, as of a general statute (*e*).

Nothing can better display the curious nicety with which pleaders attended to this science, than the distinction observed between the forms of pleading the same thing under different circumstances; or in different parts of the record. The reason of such distinctions is not always apparent, nor is often given by the lawyers of these days. It is not, however, to be supposed they had none to give, or that these varieties in form were not, in a technical light, extremely apt and necessary. Of this the reader may judge from the following specimens.

Of differences between declarations and pleas. It was laid down as a rule, that in a bar, and where a title was to be pleaded, it was not sufficient to say that such a one made a lease or gift to the defendant, but it should be stated that such a one was seised, and being so seised, he made the lease or gift; yet in a writ, or declaration, it was enough to say that he made the lease or gift, without suggesting that he was seised (*f*). The same if a feoffment or fine, or release, or quit-claim, was pleaded,

(*a*) 5 Ed. IV. 12.

(*b*) 36 Hen. VI. 5.

(*c*) 11 Hen. VI. 15.

(*d*) 21 Ed. IV. 52.

(*e*) 21 Ed. IV. 56.

(*f*) 34 Hen. VI. 48.

seisin must be alleged in the feoffor, or conusor, at the time of the feoffment or fine, or release, or quit-claim made; which was not at all necessary in a writ or declaration (a).

It was held, that if a deed was alleged in a count or avowry, where any thing was to be recovered, or a return had, then the place and county where the deed was made must be shewn, on account of the venue; and it would be a good plea to say, *nul tiel lieu*. But where a deed was pleaded in bar, and nothing was to be recovered, there was no need to shew the place and county where it was made. An avowry was considered in the nature of a declaration, if a return was prayed, otherwise it was treated only as a plea in bar (b).

Of differences between pleas. If a man was under an obligation to make a feoffment of a certain manor, and he pleaded that he had made the feoffment, he should shew where the manor was, because, said they, the feoffment could not be made except on the land. On the other hand, if he was bound to make a release, he need not shew where the manor was (c). If a man justified by special title, as descent, or feoffment, he was required to shew the quantity; as that the place contained so many acres of land, and then he was to allege his title; but if he only pleaded that the *locus in quo* was his freehold, there he need not shew the quantity (d). If a man pleaded a lease for years, he was required to shew the place in certain, but not so in a lease for life; because, said they, this was taken to be conveyed by livery, which must be on the land (e).

In trespass, if a person justified under the command of a stranger, he was required to shew the place where the command was given; but if he justified as servant under the command of a master, he need not shew the place (f). One

(a) 2 Hen. VI. 15. 10 Hen. VI. 21. (b) 6 Ed. IV. 11. (c) 15 Ed. IV. 14. (d) 22 Hen. VI. 24. (e) 3 Ed. IV. 27. (f) 12 Ed. IV. 10.

who justified under a sale in market overt, need not shew to whom the market belonged; but it was required of a person who justified by reason of a leet, right of common, and the like, to shew to whom they belonged, because the former went with the land, the latter not (*a*). When a record was pleaded, the defendant was not to say that the writ was returnable before Sir *John Prisot* and his companions, justices of the common bench, but that it was returnable before the justices of the common bench, without naming them. Yet when the return of a sheriff was to be pleaded, there the plea should allege that *A. B.* sheriff returned the writ before Sir *John Prisot* and others his companions, justices of the common bench (*b*). When a record of the court of king's bench was pleaded, it must shew *where* the court then sat; not so of the common-pleas, because that court was by *Magna Charta* to sit in a certain place; but the other was *coram rege ubicuncq; tunc fuerit in Angliâ* (*c*). Similar to these were the differences respecting the allegations of the same facts in a declaration, in different actions. Thus it was held, that in accompt, or in an avowry for an amercement in a court, it was not necessary to shew the names of the presentors; but that in debt for such an amercement, the names of the presentors should be specially stated (*d*).

It was not only in the wording, but likewise in the degree of perspicuity and intelligence, that a difference was made between declarations and pleas, and between pleas of a different kind. Though certainty was one great object of the refinement in pleading, a difference was made between the degrees of certainty; and these gradations were expressed by terms that sufficiently indicate the subtlety of the distinction, but perhaps do not make it quite intelligible. It was held, that pleas to the writ, and other dilatory pleas, should be good to *every common intent*, because they were

(*a*) 12 Ed. IV. 9. (*b*) 37 Hen. VI. 33. (*c*) 34 Hen. VI. 27. 5 Ed. IV. 8. (*d*) 9 Ed. IV. 41.

to create delay; and so if they might be taken two ways, they should be taken in that which was most against the party pleading them: but it was sufficient for a plea in bar, if it was good to a *common intent*; a declaration was required to be good to *every intent* (a). Such were the quaint measures of certainty laid down by the pleaders of these times.

If the pleading was defective in any of the
Of demurrer. foregoing requisites, either of substance or form, the adverse party might demur; that is, according to the words of the entry, *dicit quòd ipse ad prædictum placitum prædicti A. modo et formâ superiùs placitatum necesse non habet, nec per legem terræ tenetur respondere, unde pro defectu sufficientis responsionis prædicti A. in hâc parte petit judicium et damna suâ occasione transgressionis prædictæ sibi adjudicari, &c.*; or if the demurrer was to a declaration, *dicit quòd prædicta materia in narratione prædictâ contenta non est sufficiens in lege ad actionem prædictam manutenendam, unde petit judicium, quòd idem B. ab actione prædictâ habendâ præcludatur, &c* (b). Thus the conclusion of a demurrer varied according as it belonged to the plaintiff or defendant in the action.

In some cases they used to state some special matter, and then conclude with a demurrer, making the special matter the cause of the demurrer. This in many cases was optional, but in others it was required: thus in a demurrer to a double plea, it was necessary expressly to demur for the doubleness; for such a plea might not be *insufficient*, as the general form of demurrer always stated a plea to be; but inconvenient only, as part of it might be found for and part against the party pleading it (c).

If an insufficient plea was not demurred to, but the adverse party replied or rejoined, as the case might be, advantage

(a) 32 Hen. VI. 12.
VI. 6.

(b) Rast. 146.

(c) 22 Ed. IV. 50. 37 Hen.

might still be had of this defect, when the cause stood ready for judgment, by stating such matter as a reason why the *judgment* should be *arrested*; and if that occasion was let pass, it would still remain such a blemish as would make the judgment erroneous, and might therefore be discussed in a *writ of error*. If such errors turned upon a point of law, the decision in either of these stages was peremptory; but if they consisted in the form of pleading, they were called *jeofailes*, and might be set right, by the court taking upon it officially to *amend* the *jeofail*, either by virtue of their authority at common law, or under the statutes that had been passed for that purpose; or, if they felt they had no such authority, by awarding the parties to set it right themselves by *repleading*. The learning of *jeofail* and *amendment*, and of *repleader*, constituted an important appendage to the science of pleading, and deserves a proportionate consideration in the history of this branch of our law.

The beforementioned statutes of amendment Of jeofail and amendments. had laid down a rule, by which the judges were to govern themselves in the amendments they made in records (a): they were thereby authorized to amend what appeared to them to be misprisions of the clerks. As an auxiliary, and in support of this, they had adopted two other considerations which used to weigh with them in the amendments they made; one was, whether there was any thing by which they might be guided in their amendment; the other was, whether the amendment was proposed to be made in the same term in which the *jeofail* happened, or in a subsequent one. How far these operated, will be seen by reviewing some few decisions on this subject.

Where an original writ was brought against J. N. but the *capias* and other process, including the *exigent*,

(a) Vid. ant. vol. II. 448.; and ant. 278.

were against *R. N.* it was determined, over and over again, that the *capias* and other process might be amended (*a*), but not the *exigent*, because then *J. N.* would be outlawed, though he had never been proclaimed (*b*). Where a juror was omitted in the *habeas corpora*, and the other process, they would not allow the *venire facias* to be amended; but all the process after the *venire facias* was held void (*c*). Yet where, on the return of the distress, three jurors, who were before returned, were omitted upon examination of the sheriff and the jurors; it appeared to be an omission of the sheriff, and they were really summoned: this was amended as a misprision of the sheriff's clerk, and so within the statute. The same where the sheriff returned *A. B.* on the *venire*, and *J. B.* on the distress; if *A. B.* was really summoned, it would be amended: so of a return of *octo tales*, on a writ of *decem tales*, the writ should be returned to the sheriff to amend (*d*). But it was different if a *tales* was returned without manucaptors, for the manucaptors should be found by the parties; and it was their misprision and not that of the sheriff (*e*).

These were misprisions of the clerk, when there was already an existing writ, which he ought to have pursued correctly in making out the process issuing out of it. It was otherwise with the original writ, which being the ground of the whole proceeding, and being drawn upon the information of the party himself, was not amendable by the judges; as if a writ run in the *debet, et detinet*, where it should be in the *detinet* only; or if it was *vi et armis*, or in any other form that was not so warranted by law (*f*). Yet where a writ was grounded upon an obligation or an indenture, then any variance between them was amendable, because it was the misprision of the clerk in

(*a*) 4 Hen. VI. 7 Hen. VI. 27. (*b*) 20 Hen. VI. 18. 38 Hen. VI. 3.
 (*c*) 34 Hen. VI. 60. (*d*) 37 Hen. VI. 12. (*e*) 9 Ed. IV. 14.
 (*f*) 10 Ed. IV. 11, 12. 22 Ed. IV. 20. 34 Hen. VI. 26.

chancery, who ought to follow the specialty in making out the writ (*a*). But these amendments were not of course; for it seems they used to send for the clerk, and if it appeared upon examination of him, that he had the deed before him at the time, then the original was amendable, as a clear misprision of his (*b*): and from hence it may be collected, that should it have turned out that he had made the writ from false instructions, it would not have been amended in this, any more than in the common case, where a writ was made on the information of the party himself (*c*). Thus, again, if it appeared that the clerk was rightly informed, but, making a wrong conclusion, drew the writ wrong, this was amendable; as where a writ stated the baron and feme to be tenants in tail, instead of the baron singly (*d*). It was under the idea of a clerical mistake, that false Latin in an original was amendable (*e*).

We have before seen, that the process issuing from an original might be amended, if there was any variance. Again, if the entry on the roll varied from the original, it might be amended, as well at common law as by the statute (*f*). Some variations of the declaration from the writ might be amended. Thus, where the writ was *arbores succidit cepit et asportavit*, in the declaration *succidit* was left out (*g*): and it was held a clerical misprision, and amendable by the statute: on the same idea it was laid down, that many things in the writ, if left out of the declaration, might be amended (*h*). But where a writ of annuity was for a sum of money, and the declaration was for a less sum, it was held not amendable; and then the court declared it to be no misprision of the clerk, but the act of the party, or his counsel (*i*). It was a rule, that whatever was the act of the party, or his counsel, could

(*a*) 21 Hen. VI. 7. 22 Hen. VI. 43. (*b*) 11 Ed. IV. 2. (*c*) 18 Ed. IV. 13. 20 Ed. IV. 6. (*d*) 35 Hen. VI. 10, and 13. (*e*) 11 Hen. VI. 2. (*f*) 7 Hen. VI. 45. (*g*) 7 Hen. VI. 26. (*h*) 33 Hen. VI. 2. (*i*) 9 Ed. IV. 51.

not be amended. If a plea was pleaded, without concluding, *et hoc paratus est verificare*, this was held a slip of the party or his counsel, and not amendable (a).

Some of these amendments might be made by the judges at any time; others could not be made after the term. Thus the judges could not in another term amend any default of their own in giving judgment (b); and they refused to amend a declaration that varied from a writ, because it was a declaration of a preceding term (c), which could not be amended but by the assent of parties. In this respect, they made a distinction between the roll and record. Thus it was laid down, that the record was during the term in the breast of the justices, and not in the roll, which might be amended during the term; but after the term the roll became the actual record (d). It was held, though the writ of *nisi prius* might be amended by the roll, that being the warrant for it (e), yet the *nisi prius* record should not. This was in a case where the roll contained the words *die brevis*, and the record of *nisi prius* did not contain them, but the verdict was as if they were in: the reason given for this was, because the justices of *nisi prius* had no warrant for such a verdict (f).

Of repleader. As amendments wholly applied to those defects which arose from the misprisions of clerks, *repleader* was the remedy for those which were committed by the party himself, or his counsel. These being such as he would be allowed to correct at the time, if he had declared "*jeofail*," or, in other words, "I have failed in my plea, and pray leave to plead it over again;" any default whatsoever apparent upon the record, where the rules of pleading above laid down were violated by either party, might be made a reason for a repleader. For instance, if to a plea of no award it was replied that there was, this

(a) 27 Hen. VI. 10. (b) 9 Ed. IV. 3. (c) 35 Hen. VI. 37. (d) 7 Hen. VI. 29. (e) 7 Ed. IV. 15. (f) 11 Hen. VI. 11.

was a jeofail, because he ought to shew in certain what award was made, and where, and that it was the defendant's fault in not performing it; and a repleader was awarded (a): the same if a traverse was wrong taken, an issue mis-joined, a trial in a wrong county, in short, if there was any defect that would prevent the merits of the cause from being tried and decided upon the then state of the pleadings.

A repleader might be awarded after issue joined; and it was not uncommon, when the jury were ready to give their verdict, if any jeofail appeared, to discharge them, and give the parties time to replead (b). This was a short way of doing substantial justice, and there are many instances of it in the reports of this time; but it is probable, this was confined to the Middlesex causes, which used to be tried at the bar of the courts at Westminster; for it should seem, a judge at *nisi prius* would hardly interfere in questions that were entirely foreign to the issue to be tried. As repleader was awarded after an issue, so, for the same reason, was it after a demurrer (c). When a repleader was awarded, they always went back to the part of the record that was defective. Thus, if the bar was good, and the replication bad, they began to replead at the replication. If the bar was bad, and the replication good, then they began the repleader at the bar, and the plaintiff was to reply *de novo* (d).

Sometimes a vicious plea might be made good by the replication, and so preclude the necessity of a repleader; as where a release was pleaded without naming a venue, if the plaintiff replied *non est factum*, this cured the defect of the plea: in like manner a declaration might be made good by the plea (e). As a jeofail might be cured by the subsequent pleading, so it might by a verdict. Thus a bad issue, as a negative pregnant, a double plea, and the like, if found by

(a) 5 Ed. IV. 108.

(b) 7 Ed. IV. 1.

(c) 9 Hen. VI. 35.

(d) 22 Hen. VI. 19.

(e) 18 Ed. IV. 17.

verdict for the party pleading it, it was held to be cured; not so, if found for the adverse party (*a*). So if a reversioner prayed to be received, and the demandant counterpleaded that he had nothing in the reversion the day of the writ purchased, it was a *jeofail*; for he should add, nor any time since: yet if it was found in the affirmative for the prayor, it was cured by the verdict: otherwise, if it had been found for the demandant in the negative; for then it might have been that he had the reversion by descent or purchase pending the writ, though he had not had it the day of the writ purchased; which would have clearly manifested the *jeofail* (*b*).

The entry of an award of repleader might be as follows: *Postea continuato inde processu, &c. &c. Et super hoc visis præmissis, et per justitiarios hîc plenè intellectis, satis constat, quòd prædictum placitum, in præclusionem actionis prædictæ placitatum, minùs sufficiens in lege existit, et exitus inde subsequens minùs aptè junctus, per quod dictum est partibus prædictis, quòd replacitent, videlicet, quòd prædictus R. respondeat ad narrationem prædictam, et quòd prædictus S. replicet, et quòd prædictus R. rejangat, quousq; novum exitum sive novos exitus inde bene junxerint, vel in judicium placitaverint. Et prædictus R. petit licentiam interloquendi, &c* (*c*).

Thus have we laid before the reader such an account of the principal points in pleading as the nature of our historical enquiry would allow. Pleading is a branch of our law that consists of so many unconnected particulars, that it is less capable, perhaps, than any other of being reduced to the compass of an historical narration. The curiosity of pleaders in these reigns had made it so complex, that it called for the most laborious attention in the student, and the most vigilant circumspection in the practicer.

When so much anxiety was discovered in cultivating this branch of study, it was impossible almost to avoid some

(*a*) 12 Ed. IV. 6.

(*b*) 21 Hen. VI. 14.

(*c*) Rast. 505.

of the faults which were before complained of in the lawyers of Edward the Third's time. It cannot be denied that the pleaders of these times gave into much refinement, raising debates about verbal formalities, as points of the greatest moment; and such was the humour of the age, that this captiousness was not discountenanced by the bench. When the philosophy of the times was a war of words, it is not to be wondered that a learned profession should pay too great a regard to laborious trifles. The calamity has been, that after other branches of knowledge took a more liberal turn, the minutiae of pleading continued still to be respected with a sort of religious deference.

While we acknowledge ourselves indebted to the practitioners of these times for reducing to some method the plain and sensible logic of maintaining and defending a suit in a legal form, it cannot but be lamented that they suffered to creep into it, at the same time, certain technical peculiarities, so abstruse and problematical as to give the *science of good pleading* too much an air of mystery.

END OF THE THIRD VOLUME.

**T. Davison, Lombard-street,
Whitefriars, London.**

Reeves, John, 1752-1829

History of the English law, from the time of the Saxons, to the end of the
reign of Philip and Mary in four volumes

Bd.: 3

London 1814

J.rel. 352-3

urn:nbn:de:bvb:12-bsb10563633-0